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THE LAW
OF
COMBINATIONS, MONOPOLIES
AND LABOR UNIONS

BY
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OF THE NEW YORK BAR
AUTHOR OF
"THE LAW OF LIFE INSURANCE;"
"THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION"

SECOND EDITION

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PREFACE.

The present treatise is based upon, rather than a new edition of, "The Law of Trade and Labor Combinations," published in 1898.

Assimilation of the considerable mass of subsequent decisions has involved a re-examination of the fundamental theories advanced in the former treatise, with the result of an increased conviction on my part of their soundness.

As before, I employ the classification of *Combinations Producing Private Injury* and *Combinations Producing Public Injury*. Although the distinction between these classes is too broad to have escaped general notice, yet there continues much vagueness of conception as to the precise distinction, and this I have endeavored to make clear.

Considering first, *Combinations Producing Private Injury*, the confusion and conflict in the decisions relating thereto seems to me to be caused by the attempts to give effect to *intent* (that is, malicious intent or malice) and *combination* as elements of liability. The test of malicious intent has been authoritatively repudiated in England, and to a large extent in this country. Although the test of combination, that survival of the medieval doctrine of criminal conspiracy, continues to be largely accepted in this country and was recently countenanced by the House of Lords, it seems, as to the class of cases to which it is principally applicable, to have been repudiated by statute in England. That is to say, by the Trade Disputes Act of 1906, "an act done in pursuance of an agreement or combination by two or more persons shall, *if done in contemplation or furtherance of a trade dispute*, not be actionable *unless the act, if done without any such agreement or combination, would be actionable.*" A like provision was enacted in California in 1903, and I com-

mend such legislation to the consideration of the other legislatures of this country.

I again present as the fundamental and universal test of liability, so far, at least, as concerns the injuries herein considered, whether the act in question is *the natural incident or outgrowth of some lawful relation*. The three relations specially considered herein are those of *trade competitor, employer and employee*.

As to Combinations Producing Public Injury, the time may not be far distant when it will be clearly recognized that the body of existing legal doctrine relating thereto, is, to say nothing of the mass of "anti-trust legislation," a clumsy and worse than useless medieval survival; that the evils aimed at are, as a rule, best left to be corrected by the natural operation of the laws of trade. But this phase of the matter is rather for the economist or the legislator than for the jurist. The latter must recognize the existence of what is, for the present, at least, a firmly established condemnation on common law grounds of Combinations Producing Public Injury, producing, that is, restrictions upon competition.

After much confusion of thought and utterance, it is coming to be generally recognized that the most available basis of condemnation of such restrictions is by way of extending the rule formerly limited in its scope to monopolies created by the crown, to restrictions upon competition generally, resulting from acts of individuals. There still persists, in the utterances both of courts and of legislatures, the idea, the fallacy of which I have endeavored to demonstrate, that the condemnation of such restrictions is based on the medieval doctrine condemning "contracts in restraint of trade." This fallacious idea prominently appears, for instance, in the Federal Anti-Trust Act and decisions thereunder, so that, especially as interpreted by the courts, the act has considerable application beyond what seems to me to be its legitimate scope, that is, as including such "restraints of trade or commerce" as do not properly come under the description of restrictions upon competition. The most conspicuous instance of this is the application of the act to a mere boycott,

an entirely unnecessary result, as it seems to me, though I do not here undertake to say whether the fault is chargeable to Congress or to the Supreme Court.

It must be obvious upon a superficial examination that not all restrictions upon competition are subject to condemnation. But assuming, as we must, that *some* are, what shall be the test of legality? As I have endeavored to point out, what has thus far been the prevalent test is what I have called that of *extent*, a restriction being, in this view, and roughly speaking, illegal if on a large scale, otherwise not. But there seems to be a growing sense of dissatisfaction with this crudely and awkwardly working test, that it is impossible, or at least impracticable, to consistently apply. Especially as applicable to "business of a public character," what I have called the test of *reasonableness* seems to be increasing in favor, though it continues to be denied application to cases within the scope of the Federal Anti-Trust Act.

I have endeavored to include suitable references to such State and Federal statutes as were in force at the beginning of the present year, having special reference to the subjects discussed.

FREDERICK H. COOKE,

52 William St., N. Y. City, June, 1909.

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THE LAW OF COMBINATIONS, MONOPOLIES AND LABOR UNIONS

PART I.

COMBINATIONS PRODUCING PRIVATE INJURY.

CHAPTER I

GENERAL CONSIDERATIONS

- § 1. General liability for injury to another.
- 2. Injury from words, as distinguished from acts.
- 3. Acts of violence.
- 4. Acts producing fear of violence.
- 5. Threats.
- 6. Announcement of intention to do lawful act; enforcement of rule of labor union.
- 7. Injury to business.
- 8. Interference with interstate commerce and transportation of mails.

§ 1. **General liability for injury to another.**—The existence in this world of numerous human beings, most of them in close proximity to one another, gives rise to the eternal and universal conflict between the interests of one's self and those of others. Law, both human and divine, is concerned with the establishment of rules to harmonize these conflicting interests. In this treatise we are specially concerned with this conflict as it is produced in the course of strictly trade or commercial relations. But there seem to be no legal burdens or restrictions placed

upon a trader, merely by reason of his being a trader. Not merely to trade relations, but to all the other relations in life wherein exists the possibility of conflict between the interests of one's self and those of others,¹ applies the doctrine long since established, that, "*in all cases* where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages."²

§ 2. **Injury from words, as distinguished from acts.**—So far as injury results from *words*, spoken or written, the rule determining liability therefor is closely related to the law of libel and slander. But in many instances, at least, it will suffice to base the liability for injury resulting from words, upon the broad doctrine above stated, without determining whether the liability is technically for libel or slander.³

¹ See remarks of Bowen, J., in *Mogul S. S. Co. v. McGregor*, 23 Q. B. D. 598, 614 (1889); and article in 21 Am. Law Rev. 521 (1887), by J. H. Wigmore.

² 1 Comyn's Digest, Action upon the Case, p. 278, cited in *Walker v. Cronin*, 107 Mass. 555, 562 (1871); *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 623; 40 S. E. 591, 596; 56 L. R. A. 804, 811; 88 Am. St. Rep. 895 (1902). As to criminal liability, see § 89.

³ It might, perhaps, have so sufficed in the following instances, where technical actions for libel were held maintainable: *Chiatovich v. Hanchett*, 88 Fed. 873 (C. C. Nev., 1898); 96 Fed. 681 (C. C. Nev., 1899; publication of notice addressed to employees of defendant requesting them not to deal with plaintiff); affirmed as *Hanchett v. Chiatovich*, 101 Fed. 742; 41 C. C. A. 648 (9th C., 1900); *McIntyre v. Weinert*, 195 Pa. St. 52; 45 Atl. 666 (1900; falsely alleging indebtedness of plaintiff to defendant

"with the intention of injuring the plaintiff, destroying his business, and undermining his credit"); *Hartnett v. Plumbers' Supply Assoc.*, 169 Mass. 229; 47 N. E. 1002; 38 L. R. A. 194 (1897). Compare *Weston v. Barnicoat*, 175 Mass. 454; 56 N. E. 619; 49 L. R. A. 612 (1900). In *Reynolds v. Plumbers' Protective Assoc.*, 30 Misc. 709; 63 N. Y. Suppl. 303 (Supm. Ct., Tr. T., 1900), acts were sustained by an application of the doctrine of privileged communication, instead of being, as they well might have been, regarded as the natural incident or outgrowth of the relation among members of an association arising from their common interest. In *Hollenbeck v. Ristine*, 105 Iowa, 488; 75 N. W. 355; 67 Am. St. Rep. 306 (1898), it was held actionable to write a letter to the plaintiff's employer resulting in his discharge from employment, even on the assumption that the letter was not defamatory, so as to sustain a technical action for libel.

§ 3. **Acts of violence.**—As to liability for injury resulting from acts of direct violence to person or tangible property, little need be said, as they are so universally regarded as creating a civil or criminal liability, or both.⁴

For statements by a labor union concerning employers who had refused to become parties to an "early closing movement," and held not libelous, see *Watters v. Retail Clerks' Union*, 120 Ga. 424; 47 S. E. 911 (1904). As to effect of statement that a person has been placed on an "unfair list" by a labor union, see *Labor Review Pub. Co. v. Galliher*, 45 So. 188 (Supm. Ct. Ala., 1907).

See *Rice v. Albee*, 164 Mass. 88; 41 N. E. 122 (1895); *May v. Wood*, 172 Mass. 11; 51 N. E. 191 (1898); *American Ins. Co. v. France*, 111 Ill. App. 382 (1903). As to remedy by injunction, see §§ 92, 93.

⁴ For instances, see c. X. See also *Arthur v. Oakes*, 63 Fed. 310, 324; 11 C. C. A. 209, 223; 25 L. R. A. 414, 430 (7th C., 1894); modifying *Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co.*, 60 Fed. 803; 25 L. R. A. 414 (C. C. Wis., 1894); *U. S. v. Elliott*, 62 Fed. 801 (C. C. Mo., 1894); *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 515; 77 N. W. 13, 20; 42 L. R. A. 407, 414; 74 Am. St. Rep. 421 (1898); *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49; 46 Atl. 208 (1899; see as to effect of N. J. statute of 1883). See on the general subject article in 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen. As to whether legislation authorizing such acts would be constitutional, see *Southern Ry. Co. v. Machinists' Local*

Union, 111 Fed. 49 (C. C. Tenn., 1901).

Statutory declarations of liability for injuring or interfering with, or preventing or hindering the pursuit of, a business or occupation, or, in particular, against interfering with, etc., in obtaining, continuing in or leaving employment, frequently expressly prohibit acts of violence. See, for instance, Ala. Crim. Code (1907), §§ 6397, 6856; Colo. R. S. (1908), § 400; Ga. Penal Code (1895), § 124; *Jones v. E. Van Winkle Co. Gin & Machine Works*, 62 S. E. 236; 17 L. R. A. N. S. 848 (Supm. Ct. Ga., 1908); Ky. Stat. (1903); c. 32, §§ 802, 803; Me. R. S. (1903), c. 127, § 21; Mass. R. L. (1902), c. 106, § 11; Minn. R. L. (1905), § 5140; Mo. R. S. (1906), § 2155; *Carter v. Oster*, 112 S. W. 995 (Ct. App. Mo., 1908); N. Y. Penal Code, § 653; N. D. Penal Code (1905), §§ 9434-6; Okla. Stat. (1903), §§ 2642-3; Oreg. Crim. Code (1902), § 1971; R. I. Gen. Laws (1896), c. 278, § 8; S. D. Penal Code (1903), §§ 757-9; Tex. Penal Code (1895), § 600; Vt. Pub. Stat. (1906), § 5867; Wis. Stat. (1898), § 4466c.

Thus of injury to railroad property in furtherance of a strike: *Del. R. S.* (1893), p. 928; *Me. R. S.* (1903), c. 124, §§ 6, 7; *N. J. L.* 1903, c. 257, § 63; *Pa. 2 P. & L. Dig.*, pp. 3949, 3955.

By the English Conspiracy & Protection of Property Act (1875), "every person who with a view to compel any other person to abstain from doing or to do any act which

§ 4. **Acts producing fear of violence.**—It is generally recognized that within the scope of illegal acts must be included not only acts of direct violence, but acts *producing a fear* of violence, to person or property.⁵ The influence of such acts in disturbing business and social relations is so obvious that little need be said by way of justification of thus extending the scope of illegal acts. But if we formulate our doctrine thus: that *acts producing a reasonable fear of violence to person or property are illegal*, we find so general a rule to be frequently of great difficulty of application, in view of the infinite variety of circumstances of time and place to which it is capable of being applied.⁶ The acts of a child might have no influence in pro-

such other person has a legal right to do, or abstain from doing, wrongfully, and without legal authority uses violence to or intimidates such other person or his wife or children or injures his property; or persistently follows such other person about from place to place; or hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in the use thereof . . . or follows such other person with two or more other persons in a disorderly manner in or through any street or road" shall on conviction be punished as provided. See *Smith v. Moody*, 1 K. B. (1903) 56.

In *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49 (C. C. Tenn., 1901), where an injunction was allowed against unlawful acts by a labor union and its members, it was said that "the prohibitions of the English act formulate those of our own law and those which existed in England before their act." It was also said that in the case there under consideration, all of the prohibitions specified in such act had been violated "except hiding

tools and intimidating the wives and children of the 'scabs.'" As to "watching and besetting," see § 86.

⁵ Thus, it is said in *Pollock on Torts*, p. 184, that any act fitted to have the effect of putting "a reasonable man" "in present fear of violence" "may be an assault, though there is no real present ability to do the harm threatened." In 12 *Hawkins' Pleas of the Crown*, c. 62, § 1, are instanced "striking at him with or without a weapon; or presenting a gun at him at such a distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such like act, done in an angry, threatening manner." That, however, there is no liability for "the creation and application of public opinion as a constraining force upon conduct of any kind" desired to be discouraged, see *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 769; 53 Atl. 230, 234 (1902).

⁶ Thus, it was said in *Snow v. Wheeler*, 113 Mass. 179 (1879), that "it is not easy to give a definition

ducing reasonable fear in a strong man; while the same acts done by the man might produce reasonable fear in the child. The demonstration of a single individual might have no influence in producing such reasonable fear, while the same demonstration by a combination might have such influence. While the doctrine seems originally to have applied only to fear of personal injury, it is generally regarded as equally applicable to fear of injury to property.⁷

§ 5. **Threats.**—A threat is defined as “any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free voluntary action which alone constitutes consent.”⁸ In any view a threat involves the idea of expression of intention to do injury. Ordinarily such expression is in the form of a

which shall include every form of such coercion.” In *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 122; 30 Atl. 881, 889 (1894), it was said that the fear “need not be abject, but only such as to overcome his judgment” or induce him not to do, or to do, that which otherwise he would have done or have left undone.” So in *Cœur D’Alene Consolidated & Mining Co. v. Miners’ Union*, 51 Fed. 260, 267; 19 L. R. A. 382, 386 (C. C. Idaho, 1892), it was said: “What constitute such actionable threats or intimidations must be determined in each case from all the circumstances attending it. If the things done or the words spoken are such that they will excite fear, or a reasonable apprehension of damages, and so influence those for whom designed, as to prevent them from freely doing what they desire and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit and intent.” See also *Foster v. Retail Clerks’ Protective*

Assoc., 39 Misc. 48, 52; 78 N. Y. Suppl. 860, 863 (Supm. Ct., Sp. T., 1902); *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 121 (C. C. Neb., 1902); *Gray v. Building Trades Council*, 91 Minn. 171, 181; 97 N. W. 663, 667; 63 L. R. A. 753, 758; 103 Am. St. Rep. 477 (1903). As to effect of offensive remarks and abusive epithets, see *Carter v. Oster*, 112 S. W. 995 (Ct. App. Mo., 1908).

⁷ See *State v. Stockford*, 77 Conn. 227; 58 Atl. 769; 107 Am. St. Rep. 28 (1904).

⁸ *Klingel’s Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906), where “such a threat, coupled with the damage necessarily flowing from it in the prosecution of a conspiracy to do an unlawful thing” was said to be “sufficient to constitute a good cause of action.” As to definition of the word as used in *Conn. G. S.* (1902), § 1296, see *State v. Stockford*, 77 Conn. 227; 58 Atl. 769; 107 Am. St. Rep. 28 (1904).

more or less explicit declaration,⁹ though it has been said: "Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats."¹⁰

§ 6. **Announcement of intention to do lawful act; enforcement of rule of labor union.**—The better view seems to be as

⁹ Thus the effect of threats has been said to be produced by provisions in the constitution of an association for fines and penalties. *Boutwell v. Marr*, 71 Vt. 1; 42 Atl. 607; 43 L. R. A. 803; 76 Am. St. Rep. 746 (1899); *Jackson v. Stanfield*, 137 Ind. 592; 36 N. E. 345; 23 L. R. A. 588 (1894). See *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 178 (C. C., Wis., 1906).

¹⁰ *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 519; 77 N. W. 13, 22; 42 L. R. A. 407, 416; 74 Am. St. Rep. 421 (1898).

By Utah Comp. Laws (1907), § 4487x11, it is a misdemeanor to "threaten to destroy property or to do bodily harm for the purpose of preventing any person or persons from entering or remaining in the employ of any company, corporation or individual." And statutory declarations of liability for injuring or interfering with, or preventing or hindering the pursuit of, a business or occupation; or in particular against interfering with, etc., in obtaining, continuing in or leaving employment, frequently expressly prohibit the use of threats or intimidation. See statutes cited in § 3; also 3 Ill. R. S. (Starr & Curtis' ed., 1896), pp. 3297-8, §§ 129, 130, c. 38, §§ 158-160; *Christensen v. People*, 114 Ill. App. 40, 70 (1904); *Johnson v. People*, 124 Ill. App. 213

(1906); Kan. G. S. (Dassler's ed., 1905), §§ 2481-2; Mich. Comp. Laws (1897), p. 3389; see also Colo. R. S. (1908), § 3924; Conn. G. S. (1902), § 1296; *Wye-man v. Deady*, 79 Conn. 414; 65 Atl. 129; 118 Am. St. Rep. 152 (1906); *State v. McGee*, 80 Conn. 614; 69 Atl. 1059 (1908), and generally statutes declaring criminal liability for threats or extortion. See, under Wisconsin statute, *Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co.*, 60 Fed. 803, 817; 25 L. R. A. 414, 424 (C. C. Wis., 1904); *Fischer v. State*, 101 Wis. 23; 76 N. W. 594 (1898); *State v. Schultz*, 114 N. W. 505 (Supm. Ct. Wis., 1908). In *Matter of McCabe*, 29 Mont. 28; 73 Pac. 1106 (1903), the provisions of Mont. Penal Code, §§ 910, 911 as to fear and extortion were held inapplicable to the case of threat to discharge from employment. As to prohibition of Miss. Code (1906), § 1398, against, by threats of injury, intimidating into abandonment of the home and employment, see *Breeland v. State*, 79 Miss. 527; 31 So. 104 (1902). In *State v. Stockford*, 77 Conn. 227; 58 Atl. 9; 107 Am. St. Rep. 28 (1904), Conn. G. S. (1902), § 1296, was applied in sustaining a conviction for the employment of certain methods in attempting to induce an employer to execute an agreement with members of a trade union. See also as to § 1296, *State*

thus stated: "In law a threat is a declaration of an intention or determination to injure another by the commission of some *unlawful* act; and an intimidation is the act of making one timid or fearful by such declaration. If the act intended to be done is *not unlawful*, then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense."¹¹

¹¹ v. Glidden, 55 Conn. 46, 69; 8 Atl. 890, 892; 3 Am. St. Rep. 23, 27 (1887). As to sufficiency of indictment under Vermont statute, see *State v. Stewart*, 59 Vt. 273, 291; 9 Atl. 559, 569; 59 Am. Rep. 710, 717 (1887).

¹¹ *Payne v. Western & Atlantic R. R. Co.*, 13 Lea (Tenn.), 507, 521; 49 Am. Rep. 666, 674 (1884). To similar effect, *Boyer v. Western Union Tel. Co.*, 124 Fed. 246, 248 (C. C. Mo., 1903). So it was said by Lord Herschell in *Allen v. Flood*, App. Cas. (1898), 1, 129 (and compare remarks of Lord Shand, p. 165): "The terms 'threat,' 'coercion,' and even 'intimidation,' are often applied in popular language to utterances which are quite lawful, and which give rise to no liability either civil or criminal. They mean no more than this, that the so-called threat puts pressure, and perhaps extreme pressure, on the person to whom it is addressed, to take a particular course. . . . Everything depends on the nature of the representation or statement by which the pressure was exercised. The law cannot regard the act differently because you choose to call it a threat or coercion instead of an intimation or warning." In the dissenting opinion of Holmes, J., in *Vegehlahn v. Guntner*, 167 Mass. 92, 107; 44 N. E. 1077, 1081; 35 L. R. A. 722, 727; 57 Am. St. Rep. 443 (1896), it was said: "The

word 'threats' often is used as if when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do, that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences. So as to 'compulsion,' it depends on how you 'compel.' So as to 'annoyance,' or 'intimidation.'" See also dissenting opinion of Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 924, 935; 28 C. C. A. 99, 111, 122 (8th C., 1897); *State v. Van Pelt*, 136 N. C. 633; 49 S. E. 177; 68 L. R. A. 760 (1904); and on the general subject, article in 21 Am. Law Rev. 509, 529 (1887), by J. H. Wigmore. In *Perkins v. Pendleton*, 90 Me. 166; 38 Atl. 96; 60 Am. St. Rep. 252 (1897), an action for inducing a discharge from employment was sustained on allegations of "wilfully threatening, persuading, inducing and by other overt acts, compelling" the employer, "against its will and without any desire on its part so to do, to discharge the said plaintiff from its employ." As urged by counsel, there was no allegation of "any threat of injury" or use of intimidation or force.

Now whether a threat includes an announcement of intention to do a lawful act is purely a matter of definition, and comparatively speaking it is immaterial whether it is so included or not. But the idea that has gained considerable prevalence, that it is so included, has produced much harm and confusion in misleading courts into holding unlawful the mere announcement of an intention to do a lawful act,¹² though on principle it is difficult to see any illegality in such announcement,¹³ or why it is made illegal by merely calling it a threat.¹⁴ Thus if the enforcement of a rule of a labor union by fine be otherwise free from legal objection, it is, in the view herein taken, no objection to such enforcement that it is by way of "threat" to induce a member to quit or to refuse to enter employment.¹⁵

¹² Abundant illustrations will appear hereafter. Thus, see for instance, as to announcement of intention to discharge from employment, § 37.

¹³ See *Hackley v. Headley*, 45 Mich. 569, 576 (1881); *Fuller v. Roberts*, 35 Fla. 110, 117; 17 So. 359, 362 (1895). See cases cited in 6 Am. & Eng. Enc. of Law, p. 71, under article "Duress."

¹⁴ In accord with the text are *Parkinson v. Building Trades Council*, 98 Pac. 1027, 1039 (Supm. Ct. Cal., 1908); *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 329; 63 N. E. 369, 372; 58 L. R. A. 135, 141; 88 Am. St. Rep. 648 (1902); affirming 53 App. D. 227; 65 N. Y. Suppl. 946 (1900); *Park v. National Wholesale Druggists' Assoc.*, 175 N. Y. 1, 20; 67 N. E. 136, 143; 62 L. R. A. 632, 641; 96 Am. St. Rep. 578 (1903); affirming 54 App. D. 223; 66 N. Y. Suppl. 615 (1900). See *Foster v. Retail Clerks' Protective Assoc.*, 39 Misc. 48; 78 N. Y. Suppl. 860 (Supm. Ct., Sp. T., 1902); *Peo-*

ple v. McFarlin, 43 Misc. 591; 89 N. Y. Suppl. 527 (Monroe County Ct., 1904); *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611; 40 S. E. 591; 56 L. R. A. 804; 88 Am. St. Rep. 895 (1902).

¹⁵ Opposed, however, to this view is *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 110, 114; 85 N. E. 897, 899 (1908), where, in case of a strike concededly legal, relief was allowed the employer against the action of officers and members of unions in "*intimidating by the imposition of a fine, or by a threat of such fine, any person or persons from entering into the employ of the plaintiff or remaining therein.*" By the rules of the unions there was subject to fine a member working with a non-union man who refused to join the union; so persons designated as "common scabs," "inveterate or notorious scabs," and "union wreckers," those terms being applied to those who in different ways persisted in working after a strike had been called, it being said: "These fines in their operation are likely to

§ 7. **Injury to business.**—Recently the idea has gained currency that the doctrine of liability already stated applies to protect not only property, but “business.”¹⁶ But the cases of

be coercive in their nature.” To say the least, the court seems to have come very near begging the question. It may well be admitted, as stated in the majority opinion (200 Mass. 119; 85 N. E. 901), that “an act otherwise a violation of the third party’s rights” is no less “a violation because done by some member in obedience to a by-law.” But the very point involved was whether the “threat” to enforce the fine operated as a violation of any right of the employer. The court relied largely on *Martell v. White*, 185 Mass. 255; 69 N. E. 1085; 64 L. R. A. 260; 102 Am. St. Rep. 341 (1904); *Boutwell v. Marr*, 71 Vt. 1; 42 Atl. 607; 43 L. R. A. 803; 76 Am. St. Rep. 746 (1899). In *Martell v. White* and, so it seems, in *Boutwell v. Marr*, the injury complained of was to a trade competition. See § 34. The elaborate dissenting opinion of Sheldon, J., in *L. D. Willcut & Sons Co. v. Driscoll*, seems to us to furnish by far the better reason.

¹⁶ *Sparks v. McCrary*, 47 So. 332 (Supm. Ct. Ala., 1908); *State v. Glidden*, 55 Conn. 46, 71; 8 Atl. 890, 894; 3 Am. St. Rep. 23, 30 (1887; business of publishing a newspaper); *Doremus v. Hennessy*, 176 Ill. 608; 52 N. E. 924; 43 L. R. A. 797; 68 Am. St. Rep. 203 (1898); *Purington v. Hinchliff*, 219 Ill. 159; 76 N. E. 47; 2 L. R. A. N. S. 824; 109 Am. St. Rep. 322 (1905); *Christensen v. People*, 114 Ill. App. 40, 71 (1904); *Jackson v. Stanfield*, 137 Ind. 592, 613; 36 N. E. 345, 351; 23 L. R. A. 588, 596

(1894); *Hundley v. Louisville & Nashville R. R. Co.*, 105 Ky. 162; 48 S. W. 429; 63 L. R. A. 289; 88 Am. St. Rep. 298 (1898); *Underhill v. Murphy*, 117 Ky. 640; 78 S. W. 482; 111 Am. St. Rep. 262 (1904); *My Maryland Lodge v. Adt*, 100 Md. 238; 59 Atl. 721; 68 L. R. A. 752 (1905); *Willner v. Silverman*, 71 Atl. 962 (Ct. App. Md., 1909); *Martell v. White*, 185 Mass. 255, 257; 69 N. E. 1085, 1086; 64 L. R. A. 260, 262; 102 Am. St. Rep. 341 (1904); *Pickett v. Walsh*, 192 Mass. 572, 588; 78 N. E. 753, 760; 6 L. R. A. N. S. 1067, 1081; 116 Am. St. Rep. 272 (1906); *Beck v. Railway Teamsters’ Protective Union*, 118 Mich. 497, 518; 77 N. W. 13, 21; 42 L. R. A. 407, 415; 74 Am. St. Rep. 421 (1898); *Gray v. Building Trades Council*, 91 Minn. 171, 182; 97 N. W. 663, 667; 63 L. R. A. 753, 759; 103 Am. St. Rep. 477 (1903); *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 112; 30 Atl. 881, 885 (1894; business of publishing newspaper, including the right to use “plate” matter therein); *State v. Donaldson*, 32 N. J. Law, 151, 155; 90 Am. Dec. 649, 652 (1867); *Van Horn v. Van Horn*, 52 N. J. Law, 284; 20 Atl. 485; 10 L. R. A. 184 (1890); 56 N. J. Law, 318; 28 Atl. 669 (1894); *Davis v. Zimmerman*, 91 Hun, 489; 36 N. Y. Suppl. 303 (1895); *Matthews v. Shankland*, 25 Misc. 604; 56 N. Y. Suppl. 123 (Supm. Ct., Sp. T., 1898; business of publishing a newspaper); *Moores v. Bricklayers’ Union*, 7 Ry. & Corp. L. J. 108 (Super.

alleged interference with "business," when analyzed, resolve themselves either into mere cases of injury or threat of injury to person or property (the additional category of injury to business being of course unnecessary as to such cases), or into mere

Ct. Cin., 1889); *Flaccus v. Smith*, 199 Pa. St. 128; 48 Atl. 894; 54 L. R. A. 640; 85 Am. St. Rep. 779 (1901); *Purvis v. Local No. 500, United Brotherhood of Carpenters & Joiners*, 214 Pa. St. 348; 63 Atl. 585; 12 L. R. A. N. S. 642; 112 Am. St. Rep. 757 (1906); *F. R. Patch Manuf. Co. v. Protection Lodge*, 77 Vt. 294; 60 Atl. 74; 107 Am. St. Rep. 765 (1905); *Crump v. Commonwealth*, 84 Va. 927, 934; 6 S. E. 620, 624; 10 Am. St. Rep. 895, 901 (1888); *Nashville, Chattanooga, etc., Ry. Co. v. McConnell*, 82 Fed. 65, 80 (C. C. Tenn., 1897); *Bowen, J., in Mogul S. S. Co. v. McGregor*, 23 Q. B. D. 598, 614 (1889).

As instances of interference with business, held to be unlawful, the following were cited in *Bowen, J.*, in the case just cited: The intentional driving away of customers by show of violence, *Tarleton v. McGawley, Peake*, N. P., 205 (1793); the obstruction of actors on the stage by preconcerted hissing, *Clifford v. Brandon*, 2 Campbell, N. P. 358 (1810); *Gregory v. Duke of Brunswick*, 6 Manning & Gr. 205 (1843); the disturbance of wild fowl in decoys by the firing of guns, *Carrington v. Taylor*, 11 East, 571 (1809); *Keeble v. Hickeringill*, Id. 574, note (1706); the impeding or threatening servants or workmen, *Garret v. Taylor*, Cro. Jac. 567 (1620). So of preventing by intimidation persons from entering the employment of one who was thereby prevented from fulfilling contracts with the plaintiff, *Chesapeake & O. Coal*

Agency Co. v. Fire Creek Coal, etc., Co., 119 Fed. 942 (C. C. W. Va., 1902). So of refusal of carrier to deliver to a drayman freight that he was authorized by the consignee to receive, *Southern Ry. Co. v. Chambers*, 126 Ga. 404; 55 S. E. 37; 7 L. R. A. N. S. 926 (1906).

See generally as to liability for wrecking and breaking up a business, *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 445; 41 S. E. 553, 560; 57 L. R. A. 547, 555; 90 Am. St. Rep. 126 (1902); *McCartney v. Berlin*, 31 Neb. 411; 47 N. W. 1111 (1891); *Rourke v. Elk Drug Co.*, 75 App. D. 145; 77 N. Y. Suppl. 373 (1902); *Brown v. American Freehold Land Mortgage Co.*, 97 Tex. 599; 80 S. W. 985; 67 L. R. A. 195 (1904); *American Freehold Land Mortgage Co. v. Brown*, 101 S. W. 856 (Tex. Civ. App. 1907); *Murray v. McGarigle*, 69 Wis. 483; 34 N. W. 522 (1887).

Compare *Smith v. Nippert*, 76 Wis. 86; 44 N. W. 846; 20 Am. St. Rep. 26 (1890); *Barron v. Pittsburgh Plate Glass Co.*, 7 Ohio N. P. 528 (Cin. Super Ct., 1900). In *State v. Glidden*, supra, it was pointed out that the injury was not only to the business of the newspaper publisher, but to that of his employees—the fellow-workmen of the parties offending. As to survival of action for damages for injury to business, see *Jones v. Barmm*, 217 Ill. 381; 75 N. E. 505 (1905); affirming 119 Ill. App. 475 (1905).

See articles on the general subject

cases of inducing a refusal to deal. In other words, the introduction of the term "injury to business" serves to make more plausible the doctrine that merely inducing a refusal to deal is unlawful. But, in the view we take, an injury to "business"

in 34 Am. Law Rev. 161, 468 (1900), by S. D. Thompson; 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen.

As to whether the existence of a combination illegal as in restriction upon competition furnishes ground for an action by a third party, see § 164.

Not infrequent are statutory declarations of criminal liability for injuring, or interfering with, or preventing or hindering the pursuit of, a business or occupation, or, in particular, for interfering with, etc., obtaining, continuing in or leaving employment. See, for instance, Ala. Crim. Code (1907), §§ 6394 et seq. 6856; Ga. Penal Code (1895), §§ 123 (compare § 119), 125, 126; Jones v. E. Van Winkle Co. Gin & Machine Works, 62 S. E. 236; 17 L. R. A. N. S. 848 (Supm. Ct. Ga. 1908); Ill. R. S. (Starr & Curtis' ed., 1896), c. 38, §§ 96, 294-6; Johnson v. People, 124 Ill. App. 213 (1906); Allis-Chalmers Co. v. Reliable Lodge, 111 Fed. 264 (C. C. Ill., 1901); Me. R. S. (1903), c. 127, § 21; Mass. R. L. (1902), c. 106, § 11; Plant v. Woods, 176 Mass. 492, 503; 57 N. E. 1011, 1015; 51 L. R. A. 339, 344; 79 Am. St. Rep. 330 (1900); Mich. Comp. Laws (1897), p. 3389; Mo. R. S. (1906), § 2155; N. H. Pub. Stat. (1901), c. 266, § 12; N. Y. Penal Code, § 653; N. D. Const., § 23; Penal Code (1905), § 8772; Oreg. Codes (1901), § 1971; R. I. Gen. Laws (1896), c. 278, § 8; c. 279, § 45; Tex. Penal Code, §§ 309, 324, 600; Vt. Pub.

Stat. (1906), §§ 5868-9; Wis. Stat. (1898), §§ 4466a, 4466c; State ex rel. Durner v. Huegin, 110 Wis. 189, 261; 85 N. W. 1046, 1066; 62 L. R. A. 700, 746 (1901; § 4466a said to be "a mere declaration of the common law"); Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co., 60 Fed. 803, 816; 25 L. R. A. 414, 424 (C. C. Wis., 1894); Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155, 171 (C. C. Wis., 1906).

The prohibition of Tex. Penal Code, § 600, *supra*, was in *Nelson v. State*, 57 S. W. 645 (Tex. Crim. App., 1900), *supra*, held not confined to cases of employment in the service of another, but to apply to one engaged in busin. on his own account.

As to § 309, see *Bradford v. State*, 40 Tex. Crim. App. 632; 51 S. W. 379 (1899); *Holman v. State*, 40 Tex. Crim. App. 628; 51 S. W. 379 (1899).

For instances of statutory prohibitions of interference with railroad business, see 3 Ill. R. S. (Starr & Curtis' ed., 1896), p. 3297, §§ 128-131; as to application to case of quitting employment, see §§ 47, 48; Kan. G. S. (Dassler's ed., 1905), §§ 2181-4 (the sa as Ill., §§ 128-31 respectively). See also *Del. R. S.* (1893), p. 928; *Miss. Code* (1906), § 1345; *N. J. L.* 1903, c. 257, § 63; *Pa. 2 P. & L. Dig.* pp. 3949, 3955; of interference with the business of transportation generally, *Ky. Stat.* (1903), c. 32, §§ 802, 803.

As to interference with "the

has no independent existence.¹⁷ And the same may be said of fear of injury to business. It seems to have been said with reason that for the purpose of sustaining liability for injury to business it must be made to appear that the business which it

rights of any individual engaged in labor," see Utah L. 1907, c. 76; with employment, business, etc., because of membership in national guard, N. Y. Penal Code, § 171b.

In *State v. Donaldson*, 32 N. J. Law, 151, 155; 90 Am. Dec. 649, 652 (1867), combining to induce the discharge of fellow-employees by the announcement of an intention to quit employment, was held not indictable as "an injury to trade" under the statute, the court saying: "It is true that, at a far remove, an injury to an individual manufacturer may affect trade injuriously; but, in the same sense, so it is true, will an injury inflicted on a consumer of manufactured articles. But it is not this undesigned and incidental damage which is embraced within the statutory denunciation."

¹⁷ This seems to be in substantial accord with the view taken in *Allen v. Flood*, App. Cas. (1898), 1, where Lord Herschell (p. 133, and see views of Lord Davey to same effect, p. 173) vigorously disputed the proposition that "every man has a right to pursue his trade or calling without molestation or obstruction, and that any one who by any act, though it be not otherwise unlawful, molests or obstructs him, is guilty of a wrong unless he can show lawful justification or excuse for so doing." After discussing authorities cited as supporting this proposition, it was said (p. 137): "In all of them the act complained of was in its nature wrong-

ful: violence, menaces of violence, false statements. . . . The act was not wrongful merely because it affected the man in his trade, though it was this circumstance which occasioned him loss;" and again (p. 138): "I do not doubt that every one has a right to pursue his trade or employment without 'molestation' or 'obstruction,' if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition, in my opinion, has no solid foundation in reason to rest upon." See criticism of remarks of Bowen, J., in *Mogul S. S. Co. v. McGregor*, 23 Q. B. D. 598, 613 (1889). But see *Quinn v. Leathem*, App. Cas. (1901), 495, 507, 525. By § 3 of the Trade Disputes Act of 1906, "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only . . . that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills." See article in 42 Am. Law Rev. 200 (1908) by C. R. Darling.

is claimed has been interrupted "was an established one; that is, it had been successfully conducted for such a length of time, and had such a trade established, that the profits thereof are reasonably ascertainable." ¹⁸

§ 8. **Interference with interstate commerce and transportation of mails.**—In a special class of cases, that is, interference with interstate commerce and the transportation of the mails, the power to grant relief is vested in the national government by virtue of the commerce clause of the Federal Constitution. ¹⁹

¹⁸ *States v. Durkin*, 65 Kan. 101; 68 Pac. 1091 (1902).

¹⁹ In *Re Debs*, 158 U. S. 564; 15 Supm. 900; 39 L. Ed. 1092 (1895); affirming *U. S. v. Debs*, 64 Fed. 724 (C. C. Ill., 1894), such power was asserted as against striking railroad employees, without in any way questioning their right to strike. See also *U. S. v. Elliott*, 62 Fed. 801 (C. C. Mo., 1894); 64 Id. 27 (C. C. Mo., 1894); *U. S. v. Cassidy*, 67 Id. 698 (D. C. Cal., 1895); *Re Grand Jury*, 62 Fed. 828 (C. C. Ill., 1894); *Re Grand Jury*, Id. 834 (C. C. Cal., 1894); *Re Grand Jury*, Id. 840 (C. C. Cal., 1894); *Thomas v. Cincinnati, N.*

O. & T. P. Ry. Co., 62 Fed. 803, 822 (C. C. Ohio, 1894); *Wabash R. Co. v. Hannahan*, 121 Fed. 563 (C. C. Mo., 1903; for criticism of *Wabash R. Co. v. Hannahan*, see 56 Cent. L. J. 314); *Knudsen v. Benn*, 123 Fed. 636 (C. C. Minn., 1903); *National Tel. Co. v. Kent*, 156 Fed. 173 (C. C. W. Va., 1907). As to power under commerce clause to enact legislation imposing restrictions upon right to refuse to employ, or to discharge from employment on account of membership in labor organization, see *Adair v. U. S.*, 208 U. S. 161, 176; 28 Supm. 277, 281; 52 L. Ed. 436 (1908).

CHAPTER II

THE TEST OF LIABILITY

- § 9. Liability whether determined by relation of party doing injury, or by intent.
10. Relation as test of liability.
 11. The false test of malicious intent.
 12. Malice as including desire to benefit one's self.

§ 9. **Liability whether determined by relation of party doing injury, or by intent.**—In the view taken in this treatise, civil liability for injury depends solely on the nature of *the relation of the party doing the injury*, and not at all on the presence or absence of malice or malicious intent. It would seem to have been said with truth that “the English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicino nocendi*, may enter into or affect the conception of a personal wrong.”¹ Although such liability may exist in the absence of intent,² it may be conceded that to an extent it depends on whether there was such intent, as in case of a pure accident. But, ignoring such exceptional cases, we shall for present purposes assume that in each case of injury the act producing injury was done with intent to produce such injury. It will scarcely be pretended that the presence or absence of mere intent constitutes a universal test of liability. But the view that the presence or absence of *malice* or *malicious* intent constitutes a test seems recently to have gained ground, especially in connection with the determination of the legality of acts of labor and other combinations.

¹ By Bowen, J., in *Mogul S. S. Co. v. McGregor*, 23 Q. B. D. 598, 613 (1889). That the *animus vicino nocendi* did so enter into the conception of a wrong as viewed

by the Roman law, see Pollock on Torts, p. 136.

² As in case of trespass and conversion. See Pollock on Torts, p. 9.

§ 10. **Relation as test of liability.**—The persistence of the doctrine giving effect to malice or malicious intent as a test of liability, is undoubtedly due to the absence of a comprehension of what is the true test, which is, we submit, *whether the act was the natural incident or outgrowth of some lawful relation.*³

³ Although, so far as I know, this view has not previously been formulated, the court, in the leading case of *Allen v. Flood*, App. Cas. (1898), 1, seem to have come very near an apprehension of it, as not confined in its application to any particular relation, such as that of trade competitor, but extending to lawful relations generally. Thus, Lord Herschell (p. 140) explained the decision in *Mogul S. S. Co. v. McGregor*, *infra*, as not resting on the narrow basis that "the law sanctions acts which are done in furtherance of trade competition," "but rather on this, that *the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful*, but a mere exercise of the right to contract with whom, and when, and under what circumstances and upon what conditions they pleased." And some of the judges who delivered the numerous opinions in *Mogul S. S. Co. v. McGregor* seem to us to have been not far from such clear apprehension. Thus, Bowen, J., when (23 Q. B. D. 598, 618) he said: "If it was *bona fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable. But such legal justification would not exist when the act was merely done with the intention of causing temporal harm,

without reference to one's own lawful gain or the lawful enjoyment of one's own rights." See also *Glamorgan Coal Co. v. South Wales Miners' Federation*, 1 K. B. (1903) 118, 134, where, in determining liability for inducing breach of contract, the test applied seems in effect to have been whether the act of inducing was *a natural incident or outgrowth of the relation of employee*. The reversal of this decision in 2 K. B. (1903) 545 (see p. 573); *South Wales Miners' Federation v. Glamorgan Coal Co.*, App. Cas. (1905) 239, does not seem to have necessarily impaired its authority on this point. See § 64. Compare what is said in *Walker v. Cronin*, 107 Mass. 555, 563 (1871), as to "acting in the lawful exercise of *some distinct right* which furnished the defense of *a justifiable cause*." See, generally, Cooley on Torts (2d ed.), p. 93; 1 Eddy on Combinations, § 470. Suggestive discussions, more or less closely bearing on this subject, will be found in articles in 8 Harv. Law Rev. 1 (1894) by Judge O. W. Holmes; Id. 200 (1894); Id. 377 (1895); 21 Am. Law Rev. 509 (1887) by J. H. Wigmore. The last named article is rich in suggestion, but the learned author, throughout his discussion of "interference with relations," seems to us to fall into the common error of treating the subject from the standpoint of the relation of *the party injured*, instead of from that

Perhaps the most striking and suggestive illustration of such a relation is that of the owner of tangible property.⁴ Particularly has the test indicated been applied to the case of ownership of real estate.⁵ It is the generally-accepted doctrine that the owner of land is not liable for an injury resulting from an act done upon his own land, merely because the act was done with intent to do the injury. In such case the act is merely an incident or outgrowth of the lawful relation of owner. It is a mistake, however, to suppose that the doctrine is confined in

of the party doing the injury. See also articles in 11 Harv. Law Rev. 449, 463 (1898) by E. Freund; 19 Law Quart. Rev. 37, 172 (1903) by D. R. Chalmers Hunt; editorial note in 18 Id. 1 (1902); articles in 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen; 3 Va. Law Reg. 163, 169 (1897-8) by W. L. Royall. Compare as to doctrine of *privilege* in libel, Hollenbeck v. Ristine, 105 Iowa, 488; 75 N. W. 355; 67 Am. St. Rep. 306 (1898).

⁴ Thus, in *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163; 44 C. C. A. 426; 62 L. R. A. 673 (8th C., 1900) the sale of certain goods at a reduced price was held not to produce an actionable injury to the manufacturer thereof, though the motive of the seller was "to injure the business of" such manufacturer and "to cause it great loss in money," and to break up and ruin its trade among the jobbers in a certain locality. This result was reached by an application of the doctrine thus stated: "The right to offer property for sale, and to fix the price at which it may be bought, is incident to the ownership of property, and the loss which a third party sustains in consequence of the exercise of that right is *damnum absque injuria*."

⁵ *Phelps v. Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93 (1878); *Mayor, etc., of Bradford v. Pickles*, App. Cas. (1895) 587; *Metzger v. Hochrein*, 107 Wis. 267; 83 N. W. 308; 50 L. R. A. 305; 81 Am. St. Rep. 841 (1900). See, however, *Chesley v. King*, 74 Me. 164; 43 Am. Rep. 569 (1882). That, for instance, creating noises on one's land is not a natural incident or outgrowth of the relation of owner of land, see *Allen v. Flood*, App. Cas. (1898), 1, 101, commenting on *Keeble v. Hickeringill*, 11 East, 574, note (1706), a case where firing a gun on one's own land frightened wild fowl from a neighbor's decoy. It was further said (p. 133) that *Keeble v. Hickeringill* may be "explained by the circumstance that, if the defendant merely fired on his own land, in the ordinary use of it, his neighbor could make no complaint, whilst if he was not firing for any legitimate purpose connected with the ordinary use of land, he might be held to commit a nuisance." What is this but saying that the act of firing, though done upon the land, was not the natural incident or outgrowth of the lawful relation as owner of such land? See article in 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen.

its application to the relation of owner of land.⁶ The existence of the relation of party to a lawful contract enables such a party to enforce or terminate the contract according to its provisions, without reference to the presence of intent to injure another party to the contract or a third person.⁷ The doctrine just stated applies (or should be regarded as applying) to the relations of competitor in trade, of employer, and of employee. In the line of what we have already stated, the failure to recognize and apply this doctrine seems to be largely responsible for the confusion and conflict in the decisions relating to the legality of labor and other combinations. It will be our endeavor in this part of this treatise to show its application to such cases.

§ 11. **The false test of malicious intent.**—It has already been intimated that the absence of a comprehension of the true test just indicated seems to be the cause of the introduction of the false and misleading test of *malice* or *malicious intent*. This observation, however, has reference to what has been termed *malice in fact* as distinguished from *malice in law*.⁸ Malice in

⁶ This may have been the view of the court in *Moore v. Bricklayers' Union*, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889), citing dissenting opinion in *Capital & Counties Bank v. Henty*, 7 App. Cas. 741, 766 (1882).

⁷ Thus, in *Raycroft v. Tayntor*, 68 Vt. 219; 35 Atl. 53; 33 L. R. A. 225; 54 Am. St. Rep. 882 (1896), no action was held to lie for procuring a discharge from employment by threatening the employer that the defendant would terminate a contract that he had the right to terminate at any time. To the same rule seems referable *Beechley v. Mulville*, 102 Iowa, 602; 70 N. W. 107; 63 Am. St. Rep. 479 (1897), where an action by a member of a combination among fire insurance companies and agents to fix rates was held not maintainable as for a conspiracy to destroy the

plaintiff's business as an insurance agent, merely because of the combined action of the defendants to enforce the rules and penalties against him, as by imposing fines and revoking agencies. See *Ertz v. Produce Exchange Co.*, 82 Minn. 173; 84 N. W. 743; 51 L. R. A. 825; 83 Am. St. Rep. 419 (1901). Compare *Lancaster v. Hamburger*, 70 Ohio St. 156; 71 N. E. 289; 65 L. R. A. 856 (1904; see § 71), where acts of a patron of a street railway leading to the discharge of a conductor were held to furnish the latter with no cause of action against such patron irrespective of his motive.

⁸ The view condemned in the text seems expressed in *Walker v. Cronin*, 107 Mass. 555, 562 (1871), where, after stating the rule allowing an action for "loss or damage by the wrong or another," it was

fact, in its accepted signification, has reference to a certain mental or psychological condition or attitude, that is, it "means ill

added: "The *intentional* causing of such loss to another, without justifiable cause, and *with the malicious purpose to inflict it*, is of itself a wrong." The doctrine was thus forcibly stated in *State v. Glidden*, 55 Conn. 46, 71; 8 Atl. 890, 894; 3 Am. St. Rep. 23, 30 (1887), where a conspiracy was held unlawful as designed to injure the business of a newspaper: "The motive was a selfish one: to gain an advantage *unjustly* and at the expense of others; and *therefore* the act was legally corrupt. As a means of accomplishing the purpose, the parties intended to harm the company, and therefore it was malicious." The following decisions seem, generally speaking, to uphold the view condemned in the text, though in some instances, it may be malice in law rather than malice in fact, the existence or non-existence of which was regarded as the test of liability: *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 818 (C. C. Ohio, 1894); *Continental Ins. Co. v. Board of Underwriters*, 67 Fed. 310, 320 (C. C. Cal., 1895); *Doremus v. Hennessy*, *infra*; *O'Brien v. People*, 216 Ill. 354; 75 N. E. 108; 108 Am. St. Rep. 219 (1905); *Barnes v. Chicago Typographical Union*, 232 Ill. 424; 83 N. E. 940; 14 L. R. A. N. S. 1018 (1908); *Chesley v. King*, 74 Me. 164; 43 Am. Rep. 569 (1882); *Plant v. Woods*, 176 Mass. 492, 499; 57 N. E. 1011, 1014; 51 L. R. A. 339, 343; 79 Am. St. Rep. 330 (1900; see criticism of *Allen v. Flood*); *Moran v. Dunphy*, 177 Mass. 485; 59 N. E. 125; 52 L. R. A. 115; 83 Am. St. Rep. 289

(1901); *Tuttle v. Buck*, 119 N. W. 946 (Supm. Ct. Minn., 1909); *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 116; 30 Atl. 881, 886 (1894); *Beattie v. Callanan*, 82 App. D. 7; 81 N. Y. Suppl. 413 (1903); *Moore v. Bricklayers' Union*, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889); *State ex rel. Durner v. Huegin*, 110 Wis. 189, 257; 85 N. W. 1046, 1065; 62 L. R. A. 700, 744 (1901; see *Allen v. Flood* disapproved on this point). *Chesley v. King*, *supra*, contains a very instructive discussion of the general question; but see *Heywood v. Tillson*, 75 Me. 225; 46 Am. Rep. 373 (1883). See also *U. S. v. Debs*, 64 Fed. 724, 765 (C. C. Ill., 1894); affirmed in *Re Debs*, 158 U. S. 564, 598; 15 Supm. 900, 911; 39 L. Ed. 1092 (1905); *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906). For an application of the rule of liability for the natural and inevitable consequences of one's acts, see *Barr v. Essex Trades Council*, *supra* (53 N. J. Eq. 117; 30 Atl. 887), a case of the boycott of a newspaper.

See articles in 20 *Quart. Law Rev.* 10 (1904) by H. T. Terry; 16 *Harv. Law Rev.* 236 (1902-3) by E. F. McClellenn; 18 *Id.* 411, (1905) by J. B. Ames; *Id.* 423 by E. W. Huffcut; 20 *Id.* 253, 345, 428 (1907) by Jeremiah Smith; 24 *Law Mag. & Rev.* 341 (1899-1900) by D. A. Stroud; 5 *Columbia Law Rev.* 107 (1905) by W. D. Lewis. The confusion resulting from the attempt to employ this test is indicated by the following observation

will against a person.”⁹ The difficulty of determining such condition or attitude from the outward manifestations of word

of Lord Macnaghten in *Allen v. Flood*, App. Cas. (1898), 1, 144, with reference to the word “maliciously”: “Sometimes I rather doubt whether I quite understand that unhappy expression myself.” In *Flood v. Jackson*, 2 Q. B. (1895), 21, the court had an admirable opportunity to decide the case on the issue whether the act complained of was the natural incident or outgrowth of the relation of the defendant as a member of or representing a large body of employees with common interests. But the court entirely ignored the existence of this relation, using (through Lord Esher) the following somewhat remarkable language: “We have been invited to define malice. One cannot do so any more than one can define fraud, and I certainly shall not attempt it. *Every one knows what is meant by a man acting maliciously.* The only recognized tribunal that can decide whether an act is or is not malicious is a jury.” It would seem then that the statement that “every one knows what is meant by a man acting maliciously” should be qualified as follows: “Every one *except Lord Esher* knows,” etc. In the same case, however, Lopes, J., came somewhat near a more correct conception in cautiously stating “as being *applicable to the present case*, that when a person wilfully does an act to the injury of another *without any lawful cause*, that is evidence of malice.” On reversal of this decision in *Allen v. Flood*, App. Cas. (1898), 1 (see *supra*), this opinion of Lord Esher was deservedly condemned,

it being said by Lord Herschell (p. 118): “I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they were malicious. No one would know what his rights were.” In *Giblan v. National Amalgamated Labourers’ Union*, 2 K. B. (1903) 600 (see § 71), Romer, J., seems to have fallen into the same error as did Lord Esher, and see observations by the same judge in *Glamorgan Coal Co. v. South Wales Miners’ Federation*, 2 K. B. (1903) 545, 573, also observations of Stirling, J., therein (p. 577).

In *Doremus v. Hennessy*, 176 Ill. 608, 615; 52 N. E. 924, 926; 43 L. R. A. 797, 801; 68 Am. St. Rep. 203 (1898), where certain acts of trade competitors were held malicious and actionable, the court said: “Malice as here used does not merely mean an intent to harm, but means an intent to do a *wrongful* harm and injury. An intent to do a *wrongful* harm and injury is unlawful and if a *wrongful* act is done to the detriment of the right of another it is malicious, and an act maliciously done with the intent and purpose of injuring another, is not lawful competition.” This attempted explanation seems to merely shift the difficulty from the word *malicious* to the word *wrongful*, and leave us as much in the dark as before.

⁹ *Bromage v. Prosser*, 4 Barnewall & C. 247, 255 (1825). By

or act is apparent, and obviously the most absurd results would follow from making such condition or attitude, in other words, the existence or non-existence of malice in fact, a universal test of civil liability.¹⁰ Turning, however, to what has been termed *malice in law*, we find the definition thereof to be in substantial harmony with the test above indicated. "*Malice in its legal sense means a wrongful act done intentionally without just cause or excuse.*"¹¹ But the expression "without just cause

Cal. Penal Code, § 7, which has been adopted in several other States, the terms "malice" and "maliciously," used, however, with reference to *criminal liability*, are characterized as "importing a wish to vex, annoy or injure another person, established either by proof or presumption of law."

¹⁰ See, for instance, as to acts done by owner of real estate, § 10.

¹¹ *Bromage v. Prosser*, supra; *Mogul S. S. Co. v. McGregor*, 23 Q. B. D. 598, 613 (1889); *Allen v. Flood*, supra (pp. 94, 171); *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 174 (C. C. Wis., 1906); *London Guarantee & Accident Co. v. Horn*, 206 Ill. 493, 503; 69 N. E. 526, 530; 99 Am. St. Rep. 185 (1903); *John Brenner Brewing Co. v. McGill*, 62 S. W. 722 (Ct. App. Ky., 1901); *Joyce v. Great Northern Ry. Co.*, 100 Minn. 225; 110 N. W. 975; 8 L. R. A. N. S. 756 (1907); *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 117; 30 Atl. 881, 887 (1894); *Holder v. Manuf. Co.*, 135 N. C. 392; 47 S. E. 481 (1904); *Macauley v. Tierney*, 19 R. I. 255; 33 Atl. 1; 37 L. R. A. 455; 61 Am. St. Rep. 770 (1895); *State ex rel. Durner v. Huegin*, 110 Wis. 189, 249; 85 N. W. 1046, 1062; 62 L. R. A. 700, 741 (1901).

See also *Brown v. Jacobs' Phar-*

macy Co., 115 Ga. 429, 447; 41 S. E. 553, 561; 57 L. R. A. 547, 556; 90 Am. St. Rep. 126 (1902); *Martell v. White*, 185 Mass. 255, 258; 69 N. E. 1085, 1086; 64 L. R. A. 260, 262; 102 Am. St. Rep. 341 (1904); *Berry v. Donovan*, 188 Mass. 353, 356; 74 N. E. 603, 604; 5 L. R. A. N. S. 899, 902; 108 Am. St. Rep. 499 (1905); *Read v. Friendly Society of Operative Stonemasons*, 2 K. B. (1902) 732, 739; *South Wales Miners' Federation v. Glamorgan Coal Co.*, App. Cas. (1905) 239.

See in *Booth v. Burgess*, 65 Atl. 226, 233 (Ct. Ch. N. J., 1906), criticism of definition stated in text. But it was approved in *Brennan v. United Hatters of North America*, 73 N. J. Law, 729, 744; 65 Atl. 165, 171; 9 L. R. A. N. S. 254, 261 (1906), where, in defining "a wrongful act" within the meaning of such definition, it was said to be "any act which in the ordinary course will infringe upon the rights of another to his damage is wrongful, except it be done in the exercise of an equal or superior right."

As to validity of Wis. Stat. (1898), § 4466a, imposing liability for combining, etc., "for the purpose of *wilfully or maliciously* injuring another in his reputation, trade, business or profession," see

or excuse" is not far from being synonymous with "in the absence of any lawful relation of which the act is a natural incident or outgrowth." In this view *malice* is simply the quality of an act, with intent to do injury, *in the absence of any lawful relation of which the act is a natural incident or outgrowth*. Taken in this sense the use of the word malice is harmless, though it may be useless. But in the view we take, malice, understood merely as *malice in fact*, should be entirely ignored in determining the question of civil liability.¹² There

State ex rel. Durner v. Huegin, supra; Aikens v. State, 113 Wis. 419; 89 N. W. 1135 (1902); affirmed in Aikens v. Wisconsin, 195 U. S. 194; 25 Supm. 3; 49 L. Ed. 154 (1904).

¹² In support of such view, see Sparks v. McCrary, 47 So. 332 (Supm. Ct. Ala., 1908); Boyson v. Thorn, 98 Cal. 578; 33 Pac. 492; 21 L. R. A. 233 (1893); Parkinson v. Building Trades Council, 98 Pac. 1027, 1032 (Supm. Ct. Cal., 1908); Ulery v. Chicago Live-stock Exchange, 54 Ill. App. 233, 241 (1894); People v. Davis, 57 Alb. Law Jour. 170 (Cook Co., Ill. Crim. Ct., 1898); Guethler v. Altman, 26 Ind. App. 587; 60 N. E. 355; 84 Am. St. Rep. 313 (1901); Chambers v. Baldwin, 91 Ky. 121; 15 S. W. 57; 11 L. R. A. 545; 34 Am. St. Rep. 165 (1891); Bohn Manuf. Co. v. Hollis, 54 Minn. 223; 55 N. W. 1119; 21 L. R. A. 337; 40 Am. St. Rep. 319 (1893); National Protective Assoc. v. Cumming, 170 N. Y. 315, 326; 63 N. E. 369, 371; 58 L. R. A. 135, 140; 88 Am. St. Rep. 648 (1902); Payne v. Western & Atlantic R. R. Co., 13 Lea (Tenn.), 507; 49 Am. Rep. 666 (1884); Porter v. Mack, 50 W. Va. 581; 40 S. E. 459 (1901); Transportation Co. v. Standard Oil Co.,

50 W. Va. 611, 617; 40 S. E. 591, 593; 56 L. R. A. 804, 808; 88 Am. St. Rep. 895 (1901); Chiato-vich v. Hanchett, 96 Fed. 681 (C. C. Nev., 1899).

See Standard Oil Co. v. Doyle, 118 Ky. 662; 82 S. W. 271; 111 Am. St. Rep. 331 (1904); Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 133, 134; 38 Am. Dec. 346, 358, 359 (1842); Cleland v. Anderson, 66 Neb. 252, 264; 92 N. W. 306, 310; 5 L. R. A. N. S. 136, 142 (1902); Lough v. Outerbridge, 143 N. Y. 271, 282; 38 N. E. 292, 296; 25 L. R. A. 674, 679; 42 Am. St. Rep. 712 (1894); Rogers v. Evarts, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891); Foster v. Retail Clerks' Protective Assoc., 39 Misc. 48; 78 N. Y. Suppl. 860 (Supm. Ct., Sp. T., 1902). It was on this ground that in State v. Van Pelt, 136 N. C. 633, 660; 49 S. E. 177, 187; 68 L. R. A. 760, 771 (1904), on an indictment for conspiracy to injure the business of an employer, the use of certain means was held not unlawful because of the alleged purpose to induce persons to refrain from purchasing from him for fear of incurring the ill-will of the defendants.

The established rule in England

is a modified though still objectionable view; which seems to be to the effect that malice in fact may be taken into account for the purpose of creating a *presumption* of liability, subject to be overcome by showing the absence of malice in law, that is, showing the existence of a lawful relation, etc.¹³

is as just stated. *Allen v. Flood*, App. Cas. (1898) 1, where the point was elaborately discussed. It was here said by Lord Watson (p. 92): "The existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due." And it was forcibly pointed out by him to what singular results the doctrine recognizing the efficacy of evil motive might lead, even supposing it to be limited to cases of interference with a man's trade or employment. It was said by Lord Shand (p. 167): "The exercise by a person of a legal right does not become illegal because the motive of action is improper or malicious." See also p. 171. On this point *Allen v. Flood* was reaffirmed in *Quinn v. Leatham*, App. Cas. (1901) 495, 508, 524, 533, where, though an action was sustained based on a finding of "*maliciously* conspiring," it seems clear that the term *maliciously* was here understood as having reference to malice in law, rather than to malice in fact, that is, merely to an act done *in the absence of any relation of which the act was a natural incident or outgrowth*. See § 62. One, at least, of the judges seems to indicate a tendency (p. 524) to revert to the exploded test of malicious intent. So in *Read v. Friendly Society of Operative Stonemasons*, 2 K. B. (1902) 732, 739.

See elaborate discussions of ef-

fect of *Allen v. Flood* and *Quinn v. Leatham*, in *Booth v. Burgess*, 65 Atl. 226, 234 (Ct. Ch. N. J., 1906); *Parkinson v. Building Trades Council*, 98 Pac. 1027, 1033 (Supm. Ct. Cal., 1908). On this point such decisions as *Bowen v. Hall*, 6 Q. B. D. 333 (1881), and *Temperton v. Russell*, 1 Q. B. (1893) 715, so far as they hold or declare to the contrary, are overruled by *Allen v. Flood*. See *Quinn v. Leatham*, supra. *Allen v. Flood* was followed on this point in *Huttley v. Simmons*, 1 Q. B. (1898) 181; *Ajello v. Worsley*, 1 Ch. (1898) 274; *Lyons v. Wilkins*, 78 L. T. R. N. S. 618 (1898); on appeal in 1 Ch. (1899) 255; *Hubbuck v. Wilkinson*, 1 Q. B. D. (1899) 86.

In *South Wales Miners' Federation v. Glamorgan Coal Co.*, App. Cas. (1905) 239; affirming *Glamorgan Coal Co. v. South Wales Miners' Federation*, 2 K. B. (1903) 545; which reversed 1 K. B. (1903) 118, in applying the rule that it is illegal to induce another to break his contract (see §§ 27, 28, 29, 68) it was held not essential "to prove actual malice," and in one of the opinions it was said of the word "malice": "Its use may be necessary in drawing indictments; but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill-feeling, it is better to drop the word malice and so avoid all misunderstanding."

¹³ In *Aikens v. Wisconsin*, 195 U.

§ 12. **Malice as including desire to benefit one's self.**—A malicious act, that is, one malicious in fact, may readily be conceived as committed purely with intent to injure another, but without intent to benefit one's self, beyond the mere sense of gratification in another's injury. But is the term *malicious act* properly applicable to an act committed primarily at least with the intent to benefit one's self, as in case of acts committed in the course of competition in trade? The distinction becomes important in cases where the illegality of a given act depends or is supposed to depend upon the presence of malice, thus in a case of inducing breach of a contract¹⁴ or discharge of a fellow-employee.

S. 194; 25 Supm. 3; 49 L. Ed. 154 (1904), where was sanctioned the doctrine that "*prima facie* the intentional infliction of temporal damage is a cause of action" (see § 11), it was said: "We are aware that a prevailing opinion in England makes motives immaterial, although it is probable that in *Allen v. Flood*, the jury were instructed as in *Temperton v. Russell* in such a way that their finding of malice meant no more than that the defendant had acted with foresight of the harm which he would inflict, as a means to an end." For discussion of cases of malicious prosecution and libel and slander, see *Allen v. Flood*, *supra* (pp. 125, 172). As to distinction between criminal and civil liability, see *Quinn v. Leatham*, App. Cas. (1901) 495, 533.

¹³ In *Aikens v. Wisconsin*, 195 U. S. 194; 25 Supm. 3; 49 L. Ed. 154 (1904), it was said, citing *Mogul S. S. Co. v. McGregor*, 23 Q. B. D. 598, 613; A. C. (1892) 25: "It has been considered that *prima facie* the intentional infliction of

temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. If this is the correct mode of approach it is obvious that justifications may vary in extent according to the principle of policy upon which they are founded and that while some, for instance, at common law, those affecting the use of land are absolute, others may depend upon the end for which the act is done. It is no sufficient answer to this line of thought that motives are not actionable and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen."

¹⁴ Thus it was said in *Bowen v. Hall*, 6 Q. B. D. 333, 338 (1881): "If the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plain-

tiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." S. P., Walker v.

Cronin, 107 Mass. 555 (1871). See Butterick Publishing Co. v. Typographical Union No. 6, 50 Misc. 1; 100 N. Y. Suppl. 292 (Supm. Ct., Sp. T., 1906).

CHAPTER III

CONSPIRACY AND COMBINATION

§ 13. Criminal conspiracy.

14. Purpose to be accomplished, when unlawful.

15. Civil liability for criminal conspiracy.

16. Civil liability for act otherwise lawful, but done in pursuance of combination.

§ 13. **Criminal conspiracy.**—The comparatively recent introduction of the doctrine that the fact of combination creates a civil liability where otherwise it would not exist, makes it desirable to obtain a clear idea of the scope of the doctrine of criminal conspiracy, from which the above-mentioned doctrine seems to have been derived. A consideration of the authorities on this subject may well lead us to the conclusion that “no branch of the law of England is more uncertain and ill-defined than the law of criminal conspiracy.”¹ A survey of the historical conditions will assist us to understand the origin of the doctrine of criminal, as distinguished from civil, liability for conspiracy. When conspiracies to overthrow governments were more frequent and dangerous than at present, the governmental authorities found it desirable to “nip in the bud” such plots, and punish the conspirators before the conspiracy could be carried into execution. The desire to do this under form of law, if it did not actually produce, seems at least to

¹ K. E. Digby, in article in 6 Law Quart. Rev. 128 (1890), on “The Law of Criminal Conspiracy in England and Ireland.” See reply by J. G. Butcher, Id. 247 (1890), and further article by Mr. Digby, Id. 363 (1890); also articles in 17 Harv. Law Rev. 510 (1903-4) by A. V. Dicey; 3 Columbia Law Rev.

447 (1903) by W. A. Purrington; 7 Id. 229 (1907) by F. M. Burdick. So it was said in *People v. Fisher*, 14 Wend. 9; 28 Am. Dec. 501 (1835), that “the offense of conspiracy seems to have been left in greater uncertainty by the common law than most other offenses.”

have made it easier to establish, the doctrine that a combination to commit any crime was punishable, although the crime had not been executed.^{1a} This doctrine appears in English jurisprudence as early as the fourteenth century, though it does not seem to have been firmly established until the seventeenth. In that period its convenience in obtaining convictions for treason was fully demonstrated.² It has in a number of instances been extended to include cases where the acts proposed were not criminal.³ It seems, however, to have been justly concluded that "there is a great preponderance of authority in favor of the proposition that, *as a rule*, an agreement or combination is not criminal unless it be for acts or omissions (whether as 'ends' or as 'means') which would be criminal apart from agreement."⁴ A commonly accepted defini-

^{1a} See *State v. Dalton*, 114 S. W. 1132, 1137 (Ct. App. Mo., 1908). In some instances a mere agreement to commit a crime (excepting certain felonies) is by statute not a criminal conspiracy, unless in addition some act "be done to effect the object" of such conspiracy. See *N. J. L.* 1898, c. 235, § 37; *Wis. Stat.* (1898), § 4568; *State ex rel. Durner v. Huegin*, 110 *Wis.* 189, 261; 85 *N. W.* 1046, 1066; 62 *L. R. A.* 700, 746 (1901). See note 4, *infra*.

² Wright on Criminal Conspiracies and Agreements, pp. 6, 7. See article in 37 *Am. Law Rev.* 33 (1903) by F. P. Blair. These applications of the doctrine were vividly before the minds of those who conducted the Revolutionary war and founded our government. "No person shall be convicted of treason, unless on the testimony of two witnesses to the same *overt act*, or on confession in open court." *U. S. Const.*, art. 3, § 3.

³ This extension was recognized in *Reg. v. Parnell*, 14 Cox C. C. 508 (1881), and so, it seems, generally

in this country. See *Chicago, Wilmington, etc., Coal Co. v. People*, 214 *Ill.* 421, 440; 73 *N. E.* 770, 775 (1905); *Commonwealth v. Hunt*, 4 *Metc. (Mass.)* 111, 123; 38 *Am. Dec.* 346, 349 (1842); *Carew v. Rutherford*, 106 *Mass.* 1, 10; 8 *Am. Rep.* 287, 291 (1870); *Walsh v. Association of Master Plumbers*, 97 *Mo. App.* 280, 292; 71 *S. W.* 455, 459 (1902); *State v. Howard*, 129 *N. C.* 584; 40 *S. E.* 71 (1901); *State v. Stewart*, 59 *Vt.* 273; 9 *Atl.* 559; 59 *Am. Rep.* 710 (1887); *Martens v. Reilly*, 109 *Wis.* 464; 84 *N. W.* 840 (1901).

⁴ Wright on Criminal Conspiracies and Agreements, p. 48. By the English "Conspiracy and Protection of Property Act" of 1875 "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." The same pro-

tion of a conspiracy is that it is "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." ⁵

vision is found in Md. Pub. Gen. Laws (1904), art. 27, § 34, and to similar effect are Cal. L. 1903, c. 235; Okla. L. 1907, c. 53, art. 2, § 2. That this provision does not relate to *civil* remedies, see Quinn v. Leathem, App. Cas. (1901) 495, 512, 515, 527, 542; article in 19 Law Quart. Rev. 37, 182 (1903) by D. R. Chalmers Hunt. See English statutes and decisions reviewed in article in 21 Am. Law Rev. 41 (1887) by Clifford Brigham. See also National Protective Assoc. v. Cumming, 170 N. Y. 315; 63 N. E. 369; 58 L. R. A. 135; 88 Am. St. Rep. 648 (1902). As to the specific case of combinations to *increase wages*, see § 53; as to *strikes*, see § 57.

⁵ Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 123; 38 Am. Dec. 346, 349 (1842). See also Quinn v. Leathem, App. Cas. (1901) 495, 528; Giblan v. National Amalgamated Labourers' Union, 2 K. B. (1903) 600; Callan v. Wilson, 127 U. S. 540, 555; 8 Supm. 1301, 1306; 32 L. Ed. 223 (1888); Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500, 517 (C. C. Nev., 1908); Parkinson v. Building Trades Council, 98 Pac. 1027, 1032 (Supm. Ct. Cal., 1908); State v. Stockford, 77 Conn. 227; 58 Atl. 769; 107 Am. St. Rep. 28 (1904); Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 433; 41 S. E. 553, 554; 57 L. R. A. 547, 550; 90 Am. St. Rep. 126 (1902); Franklin Union v. People, 220 Ill. 355, 376; 77 N. E. 176, 183; 4 L.

R. A. N. S. 1001, 1013; 110 Am. Ct. Rep. 248 (1906); Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421; 75 N. E. 877; 2 L. R. A. N. S. 788 (1905); Standard Oil Co. v. Doyle, 118 Ky. 662; 82 S. W. 271; 111 Am. St. Rep. 331 (1904); State v. Slutz, 106 La. 182; 30 So. 298 (1901); Carew v. Rutherford, 106 Mass. 1, 10; 8 Am. Rep. 287, 291 (1870); Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 516; 77 N. W. 13, 20; 42 L. R. A. 407, 415; 74 Am. St. Rep. 421 (1898); State ex inf. Crow v. Firemen's Fund Ins. Co., 152 Mo. 1, 43; 52 S. W. 595, 607; 45 L. R. A. 363, 376 (1899); Walsh v. Association of Master Plumbers, 97 Mo. App. 280, 289; 71 S. W. 455, 457 (1902); State v. Dalton, 114 S. W. 1132, 1137 (Ct. App. Mo., 1908); State v. Van Pelt, 136 N. C. 633, 644, 667; 49 S. E. 177, 181, 189; 68 L. R. A. 760, 764, 773 (1904); Erdman v. Mitchell, 207 Pa. St. 79, 91; 56 Atl. 327, 331; 63 L. R. A. 534, 539; 99 Am. St. Rep. 783 (1903); State v. Ameker, 73 S. C. 330; 53 S. E. 484 (1906); State v. Stewart, 59 Vt. 273, 286; 9 Atl. 559, 567; 59 Am. Rep. 710, 713 (1887); Boutwell v. Marr, 71 Vt. 1; 42 Atl. 607; 43 L. R. A. 803; 76 Am. St. Rep. 746 (1899); Martens v. Reilly, 109 Wis. 464; 84 N. W. 840 (1901); State ex rel. Durner v. Huegin, 110 Wis. 189, 261; 85 N. W. 1046, 1066; 62 L. R. A. 700, 746 (1901). In Commonwealth v. Hunt, a criminal con-

§ 14. **Purpose to be accomplished, when unlawful.**—The question when, within the meaning of the definition, the purpose to be accomplished by a conspiracy is unlawful, has been one of considerable difficulty. It seems to have been said with reason

spiracy was held not charged in an indictment alleging that "the defendants, with others unknown, did assemble, conspire, confederate and agree together, not to work for any master or person who should employ any workman not being a member of a certain club, society or combination called the Boston Journeymen Bootmakers' Society, or who should break any of their by-laws, unless such workman should pay to said club such sum as should be agreed upon as a penalty for the breach of such unlawful rules, etc.; and that by means of said conspiracy they did compel one W., a master cordwainer, to turn out of his employ one H., a journeyman bootmaker, etc., in evil example," etc. The court said (4 Metc. 131; 38 Am. Dec. 356): "The averment of a conspiracy is simply an averment of an agreement amongst themselves not to work for a person who should employ any person not a member of a certain association. It sets forth no illegal or criminal purpose to be accomplished, nor any illegal or criminal means to be adopted for the accomplishment of any purpose. It was an agreement as to the manner in which they would exercise an acknowledged right to contract with others for their labor." The averment as to compelling W. to turn H. out of his employ was held mere matter of aggravation that could not supply the want of allegation of a conspiracy, or, regarding it a

substantive charge, was held not to allege a criminal conspiracy, in view of the connection in which it was used. The court, however, interpreted the agreement as not covering the case of quitting employment on breach of a contract for a fixed period, or inducing others to so quit, saying: "If a large number of men, engaged for a certain time, should combine together to violate their contract and quit their employment together, it would present a very different question."

As to application of doctrine that "where concert of action is necessary to the offense, conspiracy does not lie," see Wharton's Criminal Law, § 1339; *State v. Huegin*, supra (110 Wis. 243; 85 N. W. 1060; 62 L. R. A. 738). As to necessity that conspiracy be for commission of single indivisible wrong, as distinguished from an aggregation of acts, see *Kolel America, etc. v. Eliach*, 29 Misc. 499; 61 N. Y. Suppl. 935 (Supm. Ct., Sp. T., 1899). In *State v. Eastern Coal Co.*, 70 Atl. 1 (Supm. Ct. R. I., 1908), it was held that a corporation could be guilty of the crime of conspiracy. See as to liability of corporation therefor, *U. S. v. MacAndrews, etc., Co.*, 149 Fed. 823 (C. C. N. Y., 1906). As to respective liability of corporations and their officers or agents, see *Standard Oil Co. v. State*, 117 Tenn. 618, 662; 100 S. W. 705, 716; 10 L. R. A. N. S. 1015, 1027 (1906), which was followed in *State v. Standard Oil Co.*, 110 S. W. 565, 587

that the fact that "the courts are very far from agreement in regard to the law of conspiracy" "tends to show the danger of giving to the word 'unlawful' a broad and all-embracing meaning" in such definition.⁶ It seems clear enough that not all unlawful acts are included.⁷ But, without further discussing the point, we content ourselves with the suggestion that seems sufficient to cover the authorities, namely, that the doctrine extends to agreements "*to deprive another of his liberty or property.*"⁸ In any given case it is likely that the decision will

(Supm. Ct. Tenn., 1908), in holding that "corporations and their officers and agents who conceive and carry out a conspiracy can both be considered and counted in the two or more necessary to constitute an unlawful conspiracy."

⁶ State v. Van Pelt, 136 N. C. 633, 663; 49 S. E. 177, 188; 68 L. R. A. 760, 772 (1904).

⁷ See State v. Glidden, 55 Conn. 46, 70; 8 Atl. 890, 893; 3 Am. St. Rep. 23, 28 (1887); Commonwealth v. Hunt, 4 Metc. (Mass.) 111, 124; 38 Am. Dec. 346, 350 (1842). See also discussion in State v. Dalton, 114 S. W. 1132, 1139 (Ct. App. Mo., 1908), where it was thus concluded: "Where an additional power or enhanced ability to accomplish an injurious purpose arises by virtue of the confederation and concert of action, an element of criminal conspiracy is thereby introduced which will render sufficiently criminal either the means or the purpose, otherwise merely unlawful, to sustain a conviction, although the means or the end were not such as are indictable if performed by a single individual." It was here held an offense at common law to conspire to induce employees to quit their employment, and not to return thereto,

the purpose of the conspirators being to extort a sum of money from the employer. In *Ætna Ins. Co. v. Commonwealth*, 106 Ky. 864; 51 S. W. 624; 45 L. R. A. 355 (1899), where the authorities were elaborately reviewed, a combination in restriction upon competition assumed to be illegal, was held not to be a criminal conspiracy at common law.

⁸ State v. Glidden, 55 Conn. 46, 71; 8 Atl. 890, 894; 3 Am. St. Rep. 23, 29 (1887), where see the ordinary definitions discussed and criticised. In *Commonwealth v. Hunt*, supra (4 Metc. 121; 38 Am. Dec. 348) the injuries included in the definition were described as to "the public, or portions or classes of the community, or even to the rights of an individual." In *State v. Stewart*, infra (59 Vt. 287; 9 Atl. 567; 59 Am. Rep. 713) were included combinations that "seek to restrain trade or tend to the destruction of the material prosperity of the country" as "working injury to the whole public." Thus, in *King v. Eccles*, 3 Douglas, 337 (1783), the indictment sustained was for a conspiracy to impoverish a person and to deprive and hinder him from following and exercising his trade. In *Crump v. Commonwealth*, 84 Va.

be governed by whatever may be the local law applicable.⁹

§ 15. **Civil liability for criminal conspiracy.**—As we have just seen, the doctrine seems well established that a combination to commit a crime, or (with certain limitations) any other

927; 6 S. E. 620; 10 Am. St. Rep. 895 (1888), to injure persons in their business by making threats to their customers. In *State v. Stewart*, 59 Vt. 273; 9 Atl. 559; 59 Am. Rep. 710 (1887), to prevent, hinder and deter a corporation from employing certain persons, and to frighten them away from such employment. Here the subject was very elaborately discussed. After declaring it to be a criminal conspiracy to combine to coerce the free choice of every man to employ his talents, industry and capital as he pleases, it was said (59 Vt. 289; 9 Atl. 568; 59 Am. Rep. 715): "While such conspiracies may give to the individual directly affected by them a private right to action for damages, they at the same time lay a basis for an indictment on the ground that the State itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings." This language was approved and applied in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 919; 28 C. C. A. 99, 106 (8th C., 1897). In *State v. Dyer*, 67 Vt. 690; 32 Atl. 814 (1894), the conspiracy was not only to induce an employer to discharge an employee, but to prevent him from obtaining other employment. The inducing his discharge was, according to the doctrine stated in § 71, an unlawful act, but the preventing him from

obtaining other employment was not so, irrespective of the means employed. See *State v. Duncan*, 78 Vt. 364; 63 Atl. 225; 4 L. R. A. N. S. 1144; 112 Am. St. Rep. 922 (1906). But in *State v. Van Pelt*, supra, a conspiracy to injure business was held not *per se* indictable. As to criminal liability for acts in restriction upon competition, see § 163.

⁹ *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 121; 38 Am. Dec. 346, 348 (1842). The following provisions of the N. Y. Penal Code have been adopted in several other States: By § 168, subd. 5, it is a crime for two or more persons to conspire either "to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property belonging to or used by another, or with the use or employment thereof"; by subd. 6, "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the law." See *People v. Radt*, 15 N. Y. Crim. R. 174; 71 N. Y. Suppl. 846 (N. Y. Gen. Sess., 1900); *People v. Chandler*, 54 App. D. 111; 66 N. Y. Suppl. 391 (1900). By Ill. R. S. (Starr & Curtis' ed., 1896), c. 38, § 96, as amended by L. 1887, p. 167, "if any two or more persons conspire or agree together, or the officers or executive commit-

unlawful act, subjects the members of the combination to *criminal* liability, though the act proposed be not done. But, at least, until recently, it seems to have been equally well established that under these conditions no civil liability exists, or, as it has been said, "an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution."¹⁰ If,

tee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members, or any other persons, societies, organizations or corporations, for the purpose of establishing a so-called boycott or blacklist, or shall post or distribute any written or printed notice in any places, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment or property of another, or to obtain money or other property by false pretenses, or to do any illegal act, injurious to the public trade, health, morals, police or administration of public justice, or to prevent competition in the letting of any contract by the State or the authorities of any counties, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy" (with provision for a penalty). As to sufficiency of indictment thereunder, see *Towne v. People*, 89 Ill. App. 258 (1900). As to validity of Wis. Stat. (1898), § 4466a, imposing a liability for combining, etc., "for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession," see *Aikens v. Wisconsin*, 195 U. S. 194; 25 Supm. 3; 49 L. Ed. 154 (1904); affirming *Aikens v. State*,

113 Wis. 419; 89 N. W. 1135 (1902). See *Arthur v. Oakes*, 63 Fed. 310, 325; 11 C. C. A. 209, 224; 25 L. R. A. 414, 431 (7th C., 1894) as to this and other Wisconsin statutory provisions, said to embody "the principle that a combination or conspiracy of two or more persons to injure the rights of others is illegal." See also *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A., 7th C., 1908). But these statutes create a criminal liability, and the reference to them by the court only adds to the evidence that the court, as we shall show elsewhere (see § 15), failed to keep in mind the distinction between *criminal* and *civil* liability for conspiracy. See statutes generally relating to criminal conspiracy.

¹⁰ *Savile v. Roberts*, 1 Lord Raymond, 374 (1697); *Adler v. Fenton*, 24 How. (U. S.) 407, 410; 16 L. Ed. 696 (1860); *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 739; 19 L. R. A. 387, 392 (C. C. Ohio, 1893); *Davitt v. American Bakers' Union*, 124 Cal. 99; 56 Pac. 775 (1889); *Wye-man v. Deady*, 79 Conn. 414; 65 Atl. 129; 118 Am. St. Rep. 152 (1906); *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 433; 41 S. E. 553, 555; 57 L. R. A. 547, 550; 90 Am. St. Rep. 126 (1902); *Brewster v. Miller*, 101 Ky. 368; 41 S. W. 301; 38 L. R. A. 505 (1897); *Hundley v. Louisville & Nashville R. R. Co.*,

however, in pursuance of the conspiracy, an act is done injurious to any person, the conspirators are civilly liable to him.¹¹

§ 16. Civil liability for act otherwise lawful, but done in pur-

105 Ky. 162; 48 S. W. 429; 63 L. R. A. 289; 88 Am. St. Rep. 293 (1898); Commercial Union Assurance Co. v. Shoemaker, 63 Neb. 173; 88 N. W. 156 (1901); Hutchins v. Hutchins, 7 Hill (N. Y.), 104, 108 (1845); Von Au v. Magenheimer, 126 App. D. 257, 262; 110 N. Y. Suppl. 629, 632 (1908); Martens v. Reilly, 109 Wis. 464; 84 N. W. 840 (1901); Mogul S. S. Co. v. McGregor, 23 Q. B. D. 598, 616 (1889); Temperton v. Russell, 1 Q. B. (1893) 715. That to create a civil liability, the *means*, as well as the *purpose*, must be illegal, see Boutwell v. Marr, 71 Vt. 1; 42 Atl. 607; 43 L. R. A. 803; 76 Am. St. Rep. 746 (1899).

The distinction between civil and criminal liability for conspiracy seems to have been overlooked in Arthur v. Oakes, 63 Fed. 310; 11 C. C. A. 209; 25 L. R. A. 414 (7th C., 1894); modifying Farmers' Loan & Trust Co. v. Northern Pacific R. Co., 60 Fed. 803; 25 L. R. A. 414 (C. C. Wis., 1894). Here, though an injunction against employees of the receivers of a railroad, restraining them from "*quitting the service* of the said receivers with or without notice," was refused, yet one was allowed against their "*combining and conspiring* to quit with or without notice the service of said receivers, *with the object and intent* of crippling the property in their custody or embarrassing the operation of said railroad." See Re Higgins, 27 Fed. 443 (C. C. Tex., 1886). See comments on Arthur v. Oakes in U. S.

v. Elliott, 64 Fed. 27, 32 (C. C. Mo., 1894). The result reached in Arthur v. Oakes is that an injunction may be granted against an act which in its civil aspect is entirely lawful. The cases cited by the court to show the *illegality* of the conspiracy are all *criminal* proceedings. In Longshore Printing Co. v. Howell, 26 Oreg. 527, 547; 38 Pac. 547, 553; 28 L. R. A. 464, 473; 46 Am. St. Rep. 640 (1894), the court, apparently relying on the reasoning of and authorities cited in Arthur v. Oakes, fell into like confusion of ideas, and concluded that "there is no good reason why civil liabilities may not ensue by reason of a conspiracy to commit that which is made unlawful by statute." So in Elder v. Whitesides, 72 Fed. 724 (C. C. La., 1895), Arthur v. Oakes was followed in granting an injunction against a mere conspiracy to prevent the loading or unloading of a vessel except by such labor as might be acceptable to the defendants, but without any overt unlawful act. See article in 7 Columbia Law Rev. 229 (1907) by F. M. Burdick.

¹¹ Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 739; 19 L. R. A. 387, 392 (C. C. Ohio, 1893); Woodruff v. Hughes, 58 S. E. 551 (Ct. App. Ga., (1907); Britton v. Young, 36 Ind. App. 622; 76 N. E. 327 (1905); Klingel's Pharmacy v. Sharpe, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906); Carew v. Rutherford, 106 Mass. 1, 10; 8 Am. Rep. 287, 292

suance of combination.—Comparatively recently has sprung into recognition the doctrine that an act, entirely lawful if done by a single individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same act.¹²

(1870); *Van Horn v. Van Horn*, 52 N. J. Law, 284; 20 Atl. 485; 10 L. R. A. 184 (1890); *Temperton v. Russell*, 1 Q. B. (1893) 715; *F. R. Patch Manuf. Co. v. Protection Lodge*, 77 Vt. 294; 60 Atl. 74; 107 Am. St. Rep. 765 (1905). See *Green v. Davies*, 100 App. D. 359; 91 N. Y. Suppl. 470 (1905). As to nature of action for conspiracy, see *Porter v. Mack*, 50 W. Va. 581; 40 S. E. 459 (1901). That a corporation may be so liable, see *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611; 40 S. E. 591; 56 L. R. A. 804; 88 Am. St. Rep. 895 (1902). As to liability for acts of co-conspirator, see *Foster v. Retail Clerks' Protective Assoc.*, 39 Misc. 48, 51; 78 N. Y. Suppl. 860, 863 (Supm. Ct., Sp. T. 1902); *F. R. Patch Manuf. Co. v. Protection Lodge*, supra.

¹² *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 740; 19 L. R. A. 387, 393 (C. C. Ohio, 1893); *Id.* 746; 19 L. R. A. 395 (C. C. Ohio, 1893; quitting of train by engineer); *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 442; 41 S. E. 553, 559; 57 L. R. A. 547, 554; 90 Am. St. Rep. 126 (1902); *Pickett v. Walsh*, 192 Mass. 572, 582; 78 N. E. 753, 757; 6 L. R. A. N. S. 1067, 1078; 116 Am. St. Rep. 272 (1906); *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 110, 124; 85 N. E. 897, 903 (1908); *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 70; 71 S. W. 691, 693 (1902); *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997, 1012

(Supm. Ct. Mo., 1908); *Moore v. Bricklayers' Union*, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889; inducing refusal to deal); *Cote v. Murphy*, 159 Pa. St. 420, 427, 431; 28 Atl. 190, 192, 194; 23 L. R. A. 135, 137, 138; 39 Am. St. Rep. 686 (1894); *Bailey v. Master Plumbers*, 103 Tenn. 99, 117; 52 S. W. 853, 857; 46 L. R. A. 561, 566 (1899); *State ex rel. v. Standard Oil Co.*, 110 S. W. 565, 588 (Supm. Ct. Tenn., 1908); *Hawarden v. Youghiogheny & L. Coal Co.*, 111 Wis. 545; 87 N. W. 472; 55 L. R. A. 828 (1901); *Mogul S. S. Co. v. McGregor*, App. Cas. (1892) 25, 38, 45.

Though not so stated, this seems to be the ground on which *Mapstrick v. Range*, 9 Neb. 390; 2 N. W. 739; 31 Am. Rep. 415 (1879), a case of quitting of employment, is sustainable, if at all. See also *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811, 823 (C. C. Ohio, 1897); *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 645, 651; 14 C. C. A. 14, 22, 28 (2d C., 1895); *Loewe v. California State Federation of Labor*, 139 Fed. 71, 79, 85 (C. C. Cal., 1905); *Doremus v. Hennessy*, 176 Ill. 608; 52 N. E. 924; 43 L. R. A. 797; 68 Am. St. Rep. 203 (1898); *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 111 (1904); *Berry v. Donovan*, 188 Mass. 353, 359; 74 N. E. 603, 606; 5 L. R. A. N. S. 899, 904; 108 Am. St. Rep. 499 (1905); *Barr v. Essex Trades*

Although the origin of this doctrine may not be altogether clear,¹³ it seems to have been said with reason that such origin is evidently found "in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between

Council, 53 N. J. Eq. 101, 123; 30 Atl. 881, 889 (1894); Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 769; 53 Atl. 230, 234 (1902); People v. Duke, 19 Misc. 292 (N. Y. Co. Gen. Sess. 1897); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 186; 8 Am. Rep. 159, 165 (1871); Erdman v. Mitchell, 207 Pa. St. 79, 91; 56 Atl. 327, 331; 63 L. R. A. 534, 539; 99 Am. St. Rep. 783 (1903). Though not so distinctly stated, the existence of a combination seems largely to have influenced the decision in Curran v. Galen, 152 N. Y. 33; 46 N. E. 297; 37 L. R. A. 802; 57 Am. St. Rep. 496 (1897).

See on the general subject, articles in 34 Am. Law Rev. 161, 468 (1900) by S. D. Thompson; 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen; 17 Id. 510 (1903-4) by A. V. Dicey; 18 Id. 423 (1905) by E. W. Huffcut; 20 Id. 253, 345, 428 (1907) by Jeremiah Smith; 5 Columbia Law Rev. 447 (1903) by W. A. Purrington; 7 Id. 229 (1907); 8 Id. 117 (1908) by F. M. Burdick; 3 Va. Law Reg. 163, 168 (1897-8) by W. L. Royall.

The doctrine was approved in State ex rel. Durner v. Huegin, 110 Wis. 189, 255; 85 N. W. 1046, 1064; 62 L. R. A. 700, 743 (1901), where Huttley v. Simmons, 1 Q. B. D. (1898) 181 and other English decisions were discussed at length and, so far as to the contrary, disapproved. See Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed.

155, 175 (C. C. Wis., 1906). In State ex rel. Durner v. Huegin, the point was hardly involved, the question there being one of criminal liability. And, indeed, on appeal in Aikens v. Wisconsin, 195 U. S. 194; 25 Supm. 3; 49 L. Ed. 154 (1905), it was regarded as unnecessary to consider the point. And in State ex rel. Durner v. Huegin, at least, there was a failure to observe the fundamental distinction between *combinations producing private injury* and *combinations producing public injury*, such as what are commonly known as trusts. There is no connection whatever, at least no necessary connection, between a trust combination such as was under consideration in State ex rel. Durner v. Huegin and other cases such as the Mogul Steamship case. Yet in State ex rel. Durner v. Huegin is lurking the idea that the combination there under consideration was in part, at least, illegal as a combination in restriction upon competition (110 Wis. 252, 260; 85 N. W. 1063, 1066; 62 L. R. A. 742, 745). Compare as to criminal liability, § 14.

¹³ Perhaps it may be referred to some remarks in Gregory v. Duke of Brunswick, 6 Manning & Gr. 953, 959 (1844). See Temperton v. Russell, 1 Q. B. (1893), 715; Quinn v. Leatham, *infra* (App. Cas. 510); Moores v. Bricklayers' Union, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889).

an unlawful act and a criminal one.”¹⁴ It is largely American as to development, but seems recently to have become established in England,¹⁵ where, however, there had been a tendency to repudiate it. As indicating the supposed grounds of the doctrine, the following remarks are suggestive: “A man may encounter the acts of a single person, yet not be fairly matched against several.”¹⁶ “A number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless, but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine, but administered frequently and in larger quantities with a view to harm may be fatal as a poison.”¹⁷ “The combination is material in giving the act a different character from a similar act of an individual by reason of its greater, more dangerous and more oppres-

¹⁴ *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223, 234; 55 N. W. 1119, 1121; 21 L. R. A. 337, 340; 40 Am. St. Rep. 319 (1893). See also article in 19 Law Quart. Rev. 37, 182 (1903) by D. R. Chalmers Hunt.

¹⁵ *Quinn v. Leatham*, App. Cas. (1901) 495, where an action was sustained, based on a finding of “maliciously conspiring to induce” a customer of the plaintiff not to deal with him, such customer being thus induced not to so deal. The point received, however, comparatively little consideration. See p. 510. Here were sought to be distinguished (p. 540) *Huttley v. Simmons*, 1 Q. B. (1898) 181; *Kearney v. Lloyd*, 26 L. R. (Ireland) 268 (1889), which are apparently to the contrary. To similar effect with *Quinn v. Leatham*, see *Read v. Friendly Society of Operative Stonemasons*, 2 K. B. (1902) 732, 737. See also *South Wales Miners’ Federation v. Gla-*

morgan Coal Co., App. Cas. (1905) 239; affirming *Glamorgan Coal Co. v. South Wales Miners’ Federation*, 2 K. B. (1903) 545, which reversed 1 K. B. (1903) 118.

It is, however, thus provided by the Trade Disputes Act of 1906; “An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.” See note 22, *infra*; article in 42 Am. Law Rev. 200 (1908) by C. R. Darling.

¹⁶ Lord Bramwell in *Mogul S. S. Co. v. McGregor*, *supra*. See also observations of Stirling, J., in *Giblan v. National Amalgamated Labourers’ Union*, 2 K. B. (1903) 600.

¹⁷ Lord Brampton in *Quinn v. Leatham*, *supra* (p. 530); see also pp. 512, 538, 540.

sive effect.¹⁸ "Any one man, or any one of several men, acting independently, is powerless; but, when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase."¹⁹ "To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that in a more advanced stage of the discussion the day may come when it will be more clearly seen and will more distinctly appear in the adjudication of the courts than as yet has been the case, that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do,

¹⁸ *Moore v. Bricklayers' Union*, supra.

¹⁹ *State v. Glidden*, 55 Conn. 46, 75; 8 Atl. 890, 895; 3 Am. St. Rep. 23, 32 (1887). To similar effect, *Arthur v. Oakes*, 63 Fed. 310, 321; 11 C. C. A. 209, 221; 25 L. R. A. 414, 429 (7th C., 1894; as to which see, however, § 15); *U. S. v. Elliott*, 64 Fed. 27, 32 (C. C. Mo., 1894). So in *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 739; 19 L. R. A. 387, 392 (C. C. Ohio, 1893) involving the legality of a quitting of employment by railroad engineers, it was said: "Ordinarily the only difference between the civil liability for acts done in pursuance of a conspiracy and for acts of the same character done by a single person is in the greater probability that such acts, when done by many in a combination, will cause injury. . . . The difficulty in supposing or stating any civil liability when the acts we have been discussing are done by a single engineer is in the improbability that either by singly refusing to handle the freight he could cause any in-

jury to complainant, or by singly threatening to quit or by quitting he could procure his company to do so. But when we suppose that all or nearly all the engineers on the eight different defendant companies combine with their chief to do these unlawful acts for the purpose of injuring complainant, the intended loss becomes, not only probable, but inevitable." See similar observations in *State v. Donaldson*, 32 N. J. Law, 151; 90 Am. Dec. 649 (1867); and compare *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 821 (C. C. Ohio, 1894); *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 173 (C. C. Wis., 1906).

In *Boutwell v. Marr*, 71 Vt. 1; 42 Atl. 607; 43 L. R. A. 803; 76 Am. St. Rep. 746 (1899), a distinction was taken between united action that is independent of organization and the united action of an organization constraining the action of the members of "a suppressed minority, held to the designated course by the pressure of a system of fines and penalties."

is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals acting each according to his own preference and that of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one of degree and to reach the dignity of a difference in kind.”²⁰ According to some authorities, however, the doctrine seems rather to be that *it is easier to show* the illegality of an act when done in pursuance of a combination of individuals to do the same act, than if done by a single individual. In this view the difference is not as to liability, but as to the sufficiency of evidence. In this view also the doctrine seems to be merely a development of the doctrine already considered, that an act otherwise lawful may be made unlawful by an intent to injure. This on the supposition that it is easier to show the intent of an act done in pursuance of a combination of individuals to do the same act, than if done by a single individual.²¹ We venture to suggest that, until the

²⁰ *Martell v. White*, 185 Mass. 255, 259; 69 N. E. 1085, 1087; 64 L. R. A. 260, 263; 102 Am. St. Rep. 341 (1904).

²¹ Thus, in *Gregory v. Duke of Brunswick*, 6 Manning & Gr. 953, 959 (1844), which we have (see note 13, *supra*) referred to as perhaps the origin of the doctrine, it was said: “The act of hissing in a public theater is *prima facie* a lawful act; and even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be very difficult to infer such a motive from the insulated acts of one person unconnected with others.” So in *Moores v. Bricklayers’ Union*, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889),

it was said that “the combination is material *in being strong evidence of the malice with which the act is done.*” In this connection we may note a different, though somewhat analogous, ground suggested by Lord Bramwell, in *Mogul S. S. Co. v. McGregor*, *supra*, that “the act when done by an individual is wrong, though not punishable, because the law avoids the multiplicity of crimes: *de minimis non curat lex*; while, if done by several, it is sufficiently important to be treated as a crime.” That the doctrine rests, not strictly on the circumstance of there being anything illegal in the mere element of combination, but in the circumstance of coercion as an incident of the combination, would seem indicated by the opinion of Lord

precise warrant and ground of this doctrine are better defined, it should not be allowed a place in our jurisprudence. It has been especially applied to combinations to refuse to deal (boycotts), and to combinations to quit employment (strikes). But its existence has been thus vigorously attacked: "What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be lawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act."²²

Lindley in *Quinn v. Leathem*, supra. After stating (p. 536) that what the defendants did was "to threaten to call out the union workmen of the plaintiff and of his customers" it was said (p. 537): "One man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action." See comments on *Allen v. Flood*, App. Cas. (1898) 1. See also opinion of Lindley, J., in *South Wales Miners' Federation v. Glamorgan Coal Co.*, App. Cas. (1905) 239.

²² *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223, 234; 55 N. W. 1119, 1121; 21 L. R. A. 337, 340; 40 Am. St. Rep. 319 (1893). The same doctrine was applied under similar conditions in *Macauley v. Tierney*, 19 R. I. 255; 33 Atl. 1; 37 L. R. A. 455; 61 Am. St. Rep.

770 (1895), both being cases of refusal to deal. To similar effect, *Collins v. American News Co.*, 34 Misc. 260; 69 N. Y. Suppl. 638 (1901); affirmed in 68 App. D. 639; 74 N. Y. Suppl. 1123 (1902); *Foster v. Retail Clerks' Protective Assoc.*, 39 Misc. 48, 57; 78 N. Y. Suppl. 860, 867 (Supm. Ct., Sp. T., 1902). The doctrine was contended for with great force and eloquence in the dissenting opinion of Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 930; 28 C. C. A. 99, 117 (8th C., 1897). It was also applied in *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*, 165 Ind. 421; 75 N. E. 877; 2 L. R. A. N. S. 788 (1905); *Rowan v. Butler*, 85 N. E. 714 (Supm. Ct. Ind., 1908); *Lindsay v. Montana Federation of Labor*, 96 Pac. 127 (Supm. Ct. Mont., 1908); *Mills v. U. S. Printing Co.*, 99 App. D. 605, 608, 610; 91 N. Y. Suppl. 185, 187, 188 (1904); *N. Y., Chicago & St. Louis R. R. Co. v. Schaffer*, 65 Ohio St. 414; 62 N. E. 1036; 62 L. R. A. 931; 87 Am. St. Rep. 628 (1902); *State v.*

Eastern Coal Co., 70 Atl. 1 (Supm. Ct. R. I., 1908); *Wills v. Central Ice & Cold Storage Co.*, 39 Tex. Civ. App. 483, 491; 88 S. W. 265, 269 (1905); *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611; 40 S. E. 591; 56 L. R. A. 804; 88 Am. St. Rep. 895 (1901).

Compare Continental Ins. Co. v. Board of Underwriters, 67 Fed. 310 (C. C. Cal., 1895); *Lewin v. Welsbach Light Co.*, 81 Fed. 904 (C. C. Pa., 1897); *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 112 (C. C. Neb., 1902); *Boyer v. Western Union Tel. Co.*, 124 Fed. 246, 248 (C. C. Mo., 1903); *Master Builders' Assoc. v. Domascio*, 16 Colo. App. 25; 63 Pac. 782 (1901); *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906); *Cleland v. Anderson*, 66 Neb. 252, 263; 92 N. W. 306, 309; 5 L. R. A. N. S. 136, 142 (1902); *Booth v. Burgess*, 65 Atl. 226, 236 (Ct. Ch. N. J., 1906); *National Protective Assoc. v. Cumming*, 53 App. D. 227, 231, 236; 65 N. Y. Suppl. 946, 949, 952 (1900); affirmed in 170 N. Y. 315; 63 N. E. 369; 58 L. R. A. 135; 88 Am. St. Rep. 648 (1902); *Park v. National Wholesale Druggists' Assoc.*, 54 App. D. 223, 227; 66 N. Y. Suppl. 615, 618 (1900); affirmed in 175 N. Y. 1; 67 N. E. 136; 62 L. R. A. 632; 96 Am. St. Rep. 578 (1903); *People ex rel. Burnham v. Flynn*, 114 App.

D. 578; 100 N. Y. Suppl. 31 (1906); *Von Au v. Magenheimer*, 126 App. D. 257; 110 N. Y. Suppl. 629 (1908); *Payne v. Western & Atlantic R. R. Co.*, 13 Lea (Tenn.), 507, 521; 49 Am. Rep. 666, 674 (1884); *Delz v. Winfree*, 80 Tex. 400; 16 S. W. 111; 26 Am. St. Rep. 755 (1891); *Olive v. Van Patten*, 7 Tex. Civ. App. 630; 25 S. W. 428 (1894); *Martens v. Reilly*, 109 Wis. 464; 84 N. W. 840 (1901). In *Clemmitt v. Watson*, 14 Ind. App. 38; 42 N. E. 367 (1895), where it was held not unlawful to cause a co-employee to be thrown out of work by agreeing to quit, the court said: "What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence or attempt at intimidation." By Cal. L. 1903, c. 235, no restraining order or injunction shall be issued with relation to any "agreement, combination or contract by or between two or more persons to do or procure to be done, or not to do or procure not to be done, any act in contemplation or furtherance of any trade dispute between employers and employees in the State of California . . . if such act committed by one person would not be punishable as a crime." For similar provision of English Trade Disputes Act, see note 15, *supra*.

CHAPTER IV

REFUSAL TO DEAL

- § 17. Refusal to deal.
- 18. Contracts, etc., imposing restrictions on right to deal.
- 19. Inducing refusal to deal.
- 20. Relation justifying inducing refusal to deal.
- 21. Relation among body of tradesmen desiring protection against delinquent debtors.
- 22. Malicious intent.
- 23. Inducing refusal to deal, in pursuance of combination.

§ 17. **Refusal to deal.**—Authority seems scarcely needed for the proposition that there is nothing inherently or necessarily illegal in refusing to deal, or to continue to deal with another.¹ “The refusal to maintain trade relations with any individual is an inherent right which every person may exercise lawfully, for reasons he deems sufficient or for no reasons whatever, and it is immaterial whether such refusal is based upon reason or is the result of mere caprice, prejudice, or malice. It is a part of the liberty of action which the constitutions, State and Federal, guarantee to the citizen. It is not within the power

¹ See *Master Builders' Assoc. v. U. S. Printing Co.*, 99 App. D. 605, 609; 91 N. Y. Suppl. 185, 188 (1905); *Collins v. American News Co.*, 34 Misc. 260; 69 N. Y. Suppl. 638; affirmed in 68 App. D. 639; 74 N. Y. Suppl. 1123 (1902); *Wills v. Central Ice & Cold Storage Co.*, 39 Tex. Civ. App. 483, 491; 88 S. W. 265, 269 (1905); *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611; 40 S. E. 591; 56 L. R. A. 804; 88 Am. St. Rep. 895 (1902). See, however, *People v. Duke*, 19 Misc. 292, 298 (N. Y. Co. Gen. Sess., 1897).

of the courts to compel an owner of property to sell or part with his title to it, without his consent and against his wishes, to any particular person.”² *A fortiori* there is nothing illegal in refusing to deal with another save under certain conditions.³

§ 18. **Contracts, etc., imposing restrictions on right to deal.**—

If I have the right to refuse to deal or continue to deal with a particular person, have I not the right to bind myself by contract not to deal or continue to deal with him? Whether such contract is void as creating an unlawful restriction upon *competition* will be elsewhere considered. Apart from this what legal right is violated thereby? Not mine, as already seen. Nor is that of the person with whom I bind myself not to deal. He had no right to deal with me, and consequently my contract deprives him of no right. Nor does it seem material that such restriction upon the right to deal is contained, not in a contract in the ordinary form, but in, for instance, a statute or ordinance. A contrary conclusion has been frequently reached, however, apparently from a failure to recognize the distinction between a restriction placed upon one's own right to refuse to deal, and a restriction placed upon the right of another to refuse to deal.⁴

² *Locker v. American Tobacco Co.*, 121 App. D. 443; 106 N. Y. Suppl. 115 (1907; so held as to refusal of sales agent with the knowledge of the principal, to sell the products of the latter). For a similar expression of view, see *Lewis v. Huie-Hodge Lumber Co.*, 121 La. 658; 46 So. 685 (1908). See also *Booth v. Burgess*, 65 Atl. 226, 230 (Ct. Ch. N. J., 1906; see as to right to continue to refuse to deal).

³ In *Tanenbaum v. N. Y. Fire Ins. Exchange*, 33 Misc. 134; 68 N. Y. Suppl. 342 (Supm. Ct., Sp. T., 1900), an agreement had been made among members of an exchange composed of companies and others engaged in the fire insurance business, to refrain from paying commissions to a broker offering in-

surance, unless approved by the exchange and possessing a license issued as evidence of such approval. Such agreement was held to furnish no cause of action in favor of a broker unwilling to conduct his business in the manner required of a licensee, and consequently having no license.

⁴ The question has arisen in determining the validity, for instance, of provisions in municipal contracts or ordinances restricting employment to “union labor,” as distinguished from “non-union labor.” Such provisions were held invalid in *Adams v. Brennan*, 177 Ill. 194; 52 N. E. 314; 42 L. R. A. 718; 96 Am. St. Rep. 222 (1898); *Fiske v. People*, 188 Ill. 206; 58 N. E. 985; 52 L. R. A. 291 (1900);

§ 19. **Inducing refusal to deal.**—Scarcely less clear than the right to *refuse to deal* seems the right to *induce refusal to deal*. At any rate, under certain conditions such right seems beyond question. Thus there can, especially in case of response to a request for advice, be nothing *inherently or necessarily* illegal in inducing a person not to patronize this or that doctor or grocer. Such inducement or advice is a part of the very web and woof of ordinary neighborly and social intercourse.⁵ In a sense, injury is done by such act of inducement, in causing a loss of patronage. It seems at least doubtful, on principle, whether such injury is not in any view too remote and contingent for the law to take into consideration.⁶

Woodward v. Boston, 32 Am. Law Rev. 624 (Super. Ct. Mass., 1898); Lewis v. Board of Education of Detroit, 139 Mich. 306; 102 N. W. 756 (1905). See also State ex rel. Robert Mitchell Furniture Co. v. Toole, 26 Mont. 22; 66 Pac. 496; 55 L. R. A. 644; 91 Am. St. Rep. 386 (1901). Analogous are People ex rel. Rodgers v. Coler, 166 N. Y. 1; 59 N. E. 716; 52 L. R. A. 814; 82 Am. St. Rep. 605 (1901); People ex rel. Treat v. Coler, 166 N. Y. 144; 59 N. E. 776 (1901). See articles in 63 Alb. Law Jour. (1901) 300, 475 on "The Constitutional Right of Refusal to Deal." See also as to validity of agreements for employment of union labor only, § 54.

⁵ Reynolds v. Plumbers' Protective Assoc., 30 Misc. 709; 63 N. Y. Suppl. 303 (Supm. Ct., Tr. T., 1900; citing text); Foster v. Retail Clerks' Protective Assoc., 39 Misc. 48, 56; 78 N. Y. Suppl. 860, 866 (Supm. Ct., Sp. T., 1902).

See observations of Lords Herschell and James, in Allen v. Flood, App. Cas. (1898), 1, 126, 179. In Ulery v. Chicago Live-stock Ex-

change, 54 Ill. App. 233 (1894), the action of a live-stock exchange in requesting its members not "to employ the plaintiff in the live-stock commission business, or to transact any business with him at the Union Stock Yards," was held not unlawful, the court saying: "A person, with or without reason, may refuse to trade with another; so may ten or fifty persons refuse. An individual may advise his neighbor or friend not to trade with another neighbor; he may even command, when the command amounts only to earnest advice."

In Guethler v. Altman, 26 Ind. App. 587; 60 N. E. 355; 84 Am. St. Rep. 313 (1901), an action was held not to lie against members of a school board or their employees for inducing school children not to patronize a certain dealer, notwithstanding allegations of "threats" and "intimidation."

⁶ See § 27; Hughes v. McDonough, 43 N. J. Law, 459; 39 Am. Rep. 603 (1881). To the contrary, however, seems Moran v. Dunphy, 177 Mass. 485; 59 N. E. 125; 52 L. R.

§ 20. **Relation justifying inducing refusal to deal.**—If the right to induce refusal to deal be not an absolute one, that is; if it be necessary that there exist some special circumstances of justification for such act of inducing, we may apply the test already stated, namely, *whether the act was the natural incident or outgrowth of some lawful relation.*⁷ We might perhaps con-

A. 115; 83 Am. St. Rep. 289 (1901). See *Rice v. Albee*, 164 Mass. 88; 41 N. E. 122 (1895); *Squires v. Wason Manuf. Co.*, 182 Mass. 137; 65 N. E. 645 (1902); *Joyce v. Great Northern Ry. Co.*, 100 Minn. 225; 110 N. W. 975; 8 L. R. A. N. S. 756 (1907). In *McDonald v. Edwards*, 20 Misc. 523; 46 N. Y. Suppl. 672 (Supm. Ct., Sp. T., 1897), where the alleged injury consisted in making statements to a guaranty company by reason of which it refused to give a bond for the plaintiff's good conduct to a party with whom the plaintiff was negotiating for employment, whereupon such party refused to employ the plaintiff, no action was held to lie, the act complained of not being the proximate cause of the injury. The court said: "Between the wrong of the defendant and the damage to the plaintiff, the voluntary act of a third party intervened; and that act was the proximate cause of plaintiff's loss of employment." Moreover, the defendant did not volunteer his opinion of the plaintiff to the company, which had been referred to the defendant by the plaintiff to furnish information as to his habits and character.

It was said by Lord Lindley in *Quinn v. Leatham*, App. Cas. (1901) 495, 534, with reference to "interference with liberty to deal": "If such interference is wrongful,

the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others and is thereby damaged—the whole aspect of the case is changed: the wrong done to others reaches him; his rights are infringed, although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done." See, on the general subject, articles in 37 Am. Law Reg. N. S. 273 (1898) by E. W. Huffcut; 42 Id. 124 (1903); 44 Id. 465 (1905) by W. D. Lewis; 43 Id. 73 (1904) by C. R. Darling; 15 Harv. Law Rev. 427 (1901-2) by Bruce Wyman; 16 Id. 236 (1902-3) by E. F. McClennen; 18 Id. 423 (1905) by E. W. Huffcut; 20 Id. 253, 345, 428 (1907) by Jeremiah Smith.

As to relief against execution of objects of "conspiracy in restraint of trade," the injury being inducing refusal to deal, see § 164.

⁷ See § 10.

tent ourselves with asserting the general relation as a member of society, justifying such act as a natural incident or outgrowth of ordinary neighborly or social intercourse.⁸ But, according to the authorities generally, such general relation seems regarded as insufficient,⁹ and some special relation to be necessary, at any rate, when the act of inducing is that of a combination as distinguished from a mere individual,¹⁰ and committed with malice, that is, malice in fact.¹¹ It seems, however, that, in the absence of proof to the contrary, the existence of a specific relation sufficient to justify the act will be readily, even if not necessarily presumed.¹² There is a large possible

⁸ This view seems fully sustained by *Boyson v. Thorn*, 98 Cal. 578; 33 Pac. 492; 21 L. R. A. 233 (1893), which, although a case of inducing to break a contract, seems *a fortiori* applicable to the case of inducing not to deal.

⁹ Thus in *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 623; 40 S. E. 591, 596; 56 L. R. A. 804, 811; 88 Am. St. Rep. 895 (1902), a case of inducing not to deal with a corporation engaged in the business of transporting oil, where it did not appear that "the defendants were engaged in the business of buying, refining and transporting oil as competitors with the plaintiff" so as to "present a justification for their action." So it was held in *Delz v. Winfree*, 80 Tex. 400; 16 S. W. 111; 26 Am. St. Rep. 755 (1891), actionable for a combination of cattle dealers to induce others not to sell to a butcher, it appearing that their interference with his business was not to serve any legitimate purpose of their own, but was wanton and malicious, causing pecuniary loss to him, as they intended. Here the relation of the defendants does not

appear; but compare subsequent decision. See § 21. So of a combination to induce others not to patronize a hotel keeper, the only motive being revenge on account of acts done by such hotel keeper as a public official. *Webb v. Drake*, 52 La. Ann. 290; 26 So. 791 (1899; see § 33). So in *Ertz v. Produce Exchange*, 79 Minn. 140; 81 N. W. 737; 48 L. R. A. 90; 79 Am. St. Rep. 433 (1900), it was said that it did not appear that the parties to the combination "had any legitimate interests to protect by their alleged combination." It would seem, however, on the facts that their acts might have been justified as incident to the relation of trade competitor. See § 34.

¹⁰ See § 23. See *Mills v. U. S. Printing Co.*, 99 App. D. 605, 610; 91 N. Y. Suppl. 185, 188 (1904).

¹¹ See § 22.

¹² Thus, in *Collins v. American News Co.*, 34 Misc. 260; 69 N. Y. Suppl. 638 (1901); affirmed in 68 App. D. 639; 74 N. Y. Suppl. 1123 (1902), where the relation proved or presumed was that of trade competitor.

variety in such special relations.¹³ Those of trade competitor and of employer and employee will hereafter be considered each in its proper connection.

§ 21. **Relation among body of tradesmen desiring protection against delinquent debtors.**—The interest common to a body of tradesmen to protect themselves against delinquent debtors has been regarded as sufficient to sustain an agreement among the members of such a body not to deal with a person indebted to any one of their number.¹⁴ Carrying out such an agreement commonly involves a rather extensive circulation of the fact of such indebtedness,¹⁵ and the existence of the relation above

¹³ See, for instance, *Guethler v. Altman*, 26 Ind. App. 587; 60 N. E. 355; 84 Am. St. Rep. 313 (1901), where no action was held to lie for inducing school children not to patronize a certain dealer. The relation to the children of those so inducing them, was that of members of a school board and a superintendent and teacher employed by such board, the court saying that "it was proper for the school authorities to make such reasonable rules and regulations as were necessary for the discipline, government and management of the school."

¹⁴ *Delz v. Winfree*, 6 Tex. Civ. App. 11; 25 S. W. 50 (1894; as to former decision, see § 20); *Brewster v. Miller*, 101 Ky. 368; 41 S. W. 301; 38 L. R. A. 505 (1897); *Woodhouse v. Powles*, 43 Wash. 617; 86 Pac. 1063; 8 L. R. A. N. S. 783; 117 Am. St. Rep. 1079 (1906). To similar effect, *Schulten v. Bavarian Brewing Co.*, 96 Ky. 224; 28 S. W. 504 (1894). In *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64; 71 S. W. 691 (1902), such an agreement was held within the prohibition of the Missouri anti-trust act (see § 220).

It was here intimated, however (97 Mo. App. 78; 71 S. W. 696) that a combination designed for protection against *dishonest* debtors might have been differently regarded, mere failure to pay not being considered as a necessary indication of dishonesty. See *Brewster v. Miller* distinguished in *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 451; 41 S. E. 553, 562; 57 L. R. A. 547, 558; 90 Am. St. Rep. 126 (1902). See article in 39 Am. Law Reg. N. S. 691 (1900) by F. B. Bracken.

From the prohibition of Colo. R. S. (1908), §§ 396 et seq., against blacklisting, etc. (see § 43), is expressly excepted (§ 401) the case of "any merchant or professional man, or any association of the same, maintaining or publishing a list concerning the credit or financial responsibility of any person or persons dealing with him or them on credit." Compare as to blacklisting, § 43.

¹⁵ In *Reynolds v. Plumbers' Protective Assoc.*, 30 Misc. 709; 63 N. Y. Suppl. 303 (Supm. Ct., Tr. T., 1900), it was held not unlawful to enforce a by-law of a corporation providing that in case of failure of a debtor of a member to settle with

stated is no protection against liability for making a false statement of such indebtedness,¹⁶ though there may be an ex-

the member or present to the corporation some reason for not doing so, or submit the controversy to arbitration, the association should send each member a statement that the debtor's name had been entered on its books and that the members were prohibited from selling him goods except for cash before delivery, until he should have settled. The decision was based on the doctrine of privileged communications, instead of, as it well might have been, on the existence of the relation stated in the text.

In *Hartnett v. Plumbers' Supply Assoc.*, 169 Mass. 229; 47 N. E. 1002; 38 L. R. A. 194 (1897), the enforcement of a by-law under conditions similar to those existing in *Reynolds v. Plumbers' Protective Assoc.*, was held actionable, a distinction being taken between action of the corporation itself and action of the individual members thereof. Furthermore, such action of the corporation was held not authorized by any of the statutes under which it existed, so that it constituted the exercise of "a franchise or privilege not conferred by law." And on this latter ground the decision was distinguished in *Reynolds v. Plumbers' Protective Assoc.*, *supra*. As to application of prohibition of N. Y. Penal Code, § 559, against sending letter "with intent thereby to cause annoyance," to case of sending letter to delinquent debtor, see *People v. Loveless*, 84 N. Y. Suppl. 1114 (N. Y. Gen. Sess., 1903).

¹⁶ *Weston v. Barnicoat*, 175 Mass. 454; 56 N. E. 619; 49 L. R. A. 612 (1900), where was sustained an action against a member of an as-

sociation for falsely reporting the plaintiff as refusing or neglecting to pay his honest debts, whereupon the plaintiff's name was placed upon the "blacklist" of the association and he was "boycotted" by the members. To similar effect, *McIntyre v. Weinert*, 195 Pa. St. 52; 45 Atl. 666 (1900); *John Brenner Brewing Co. v. McGill*, 62 S. W. 722 (Ky. Ct. App., 1901); *Trapp v. DuBois*, 76 App. D. 314; 78 N. Y. Suppl. 505 (1902); *Werner v. Vogeli*, 10 Kan. App. 536; 63 Pac. 607 (1901). See also *Schulten v. Bavarian Brewing Co.*, *supra*; *Windisch-Muhlhauser Brewing Co. v. Bacon*, 53 S. W. 520 (Ky. Ct. App., 1899); *Woodhouse v. Powles*, 43 Wash. 617; 86 Pac. 1063; 8 L. R. A. N. S. 783; 117 Am. St. Rep. 1079 (1906). In *Western Union Tel. Co. v. Pritchett*, 108 Ga. 411; 34 S. E. 216 (1899), in pursuance of an agreement between two telegraph companies whereby each furnished to the other information concerning the standing and credit of all persons deemed by it to be of questionable responsibility in business transactions, a person was "falsely and maliciously blacklisted in writing as a delinquent debtor who would not pay his debts and as lacking in honesty to do so." The court in holding this actionable said that the agreement in question was "not essential to the protection or preservation of any right connected with any matter in which either company had an interest" and that the communication in question was not within the meaning of a statute declaring privileged "statements made with the

ception in case of a false statement made in good faith, in the belief that it is true.¹⁷

§ 22. **Malicious intent.**—According to what has already been said, if inducing refusal to deal be not inherently legal, the test of legality is whether the act was the natural incident or outgrowth of some lawful relation, and in the view already taken malice or malicious intent should be entirely ignored as a test of legality,¹⁸ though there is observable a tendency to apply such test. Thus it has been broadly stated as “the result of the authorities” that “a combination by two or more persons to *induce others not to deal* with a particular individual, or enter into contracts with him, *if done with the intention of injuring him*, is an actionable wrong if damage results to him therefrom.”¹⁹

bona fide intent on the part of the speaker to protect his own interest in a matter where it is concerned.”

¹⁷ Trapp v. Du Bois, *supra*. Thus it was said in Weston v. Barnicoat, *supra*: “We do not mean to say that the statement might not have been privileged if believed to be true and if the purpose of the association and publication was, and was understood to be, merely to give information to the members concerning the credit of people with whom they might deal.” See also, as to when such publication is privileged, Harper v. Hamilton Retail Groc. Assoc., 32 Ont. Rep. 295 (1900).

¹⁸ Locker v. American Tobacco Co., 121 App. D. 443; 106 N. Y. Suppl. 115 (1907).

¹⁹ Lopes, J., in Temperton v. Russell, 1 Q. B. (1893), 715, 731.

Even in Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 730; 19 L. R. A. 387 (C. C. Ohio, 1893), a conspicuous illustration of the application of the doctrine that an act entirely lawful,

if done by a single individual, may be unlawful by reason of being done in pursuance of a combination of individuals to do the same thing, it seems to be held that there is nothing unlawful in the mere combination, apart from the question of intent. Thus, it was said (p. 738): “Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, *when the acts are done with malice; i. e., with the intention to injure another*

§ 23. Inducing refusal to deal, in pursuance of combination.—

The question of the legality of inducing refusal to deal has more commonly arisen in case of the acts of combinations than of mere individuals. But, as with malice or malicious intent, so in the view already taken, the element of combination should be entirely ignored as a test of liability, that is to say, it is entirely immaterial whether or not the act of inducing refusal to deal was in pursuance of a combination to do such act. Nevertheless here, too, there is observable a tendency to apply such test.²⁰

without lawful excuse." This language was applied in *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 116; 30 Atl. 881, 886 (1894).

In *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 921; 28 C. C. A. 99, 108 (8th C., 1897), a case of a threatened boycott by employees, the court called attention to the fact that one object was "to deprive the public at large of the benefits to be derived from a labor-saving machine, which seems to have been one of great utility."

²⁰ An illustration of such tendency is *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 821 (C. C. Ohio, 1894), where a boycott of the Pullman Palace Car Company by railroad employees was declared illegal, not merely under the general law of boycotts, but on account of the gigantic character of a combination relating to what was "necessary to life and health and comfort of the people of this country," the court saying (p. 807): "As the lodges of the American Railway Union extended from the Allegheny Mountains to the Pacific coast, it will be seen that it was contemplated by those engaged in carrying out this plan that, in case of a refusal of the railway companies to

join the union in its attack upon the Pullman Company, there should be a paralysis of all railway traffic of every kind throughout that vast territory traversed by lines using Pullman cars."

In *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 69; 71 S. W. 691, 692 (1902), where was held illegal the combination to refuse to sell, there under consideration, it was said, with reference to the asserted right to refuse to sell: "The argument properly applied is disastrous to those who advance it. Any one may exercise a choice as to whom he will sell his goods, but he cannot enter into a contract whereby he binds himself not to sell, for in such instance he barter away his right of choice and destroys the very right he claims the privilege of exercising. After entering upon such agreement he is no longer a free agent." The fallacy of such reasoning scarcely needs pointing out. Of course, a person, while free to do or not to do a certain thing, may, generally speaking, enter into a binding contract not to do or to do such thing, as the case may be. I am, generally speaking, free not to pay a certain person a sum of money on a

certain day, but I may also enter into an agreement in which I "barter away my right of choice" not to pay him such sum on that day. The binding agreement in the latter case is just as legal as the untrammelled refusal to pay in the former.

That there is a distinction in legal effect between merely combining to refuse to deal and combining to induce others to refuse to deal, see *Booth v. Burgess*, 65 Atl. 226, 230 (Ct. Ch. N. J., 1906).

CHAPTER V

BOYCOTTS

§ 24. Definition of boycott.

25. Boycott whether illegal apart from violence or acts producing fear of violence.

26. Relation justifying boycott.

§ 24. **Definition of boycott.**—The word “boycott,” which is of very recent origin, dating back only to about 1880,¹ is commonly applied to the act of refusing to deal or of inducing refusal to deal. That is to say, a boycott as here defined is *the act of a combination of persons in refusing to deal or in inducing others to refuse to deal with a third person.*² Strictly speaking,

¹ Century Dictionary. For an account of its origin, see Mr. Justin McCarthy’s “England under Gladstone,” and quotation therefrom in *State v. Glidden*, 55 Conn. 46, 76; 8 Atl. 890, 896; 3 Am. St. Rep. 23, 34 (1887). In *Moore v. Bricklayers’ Union*, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889), reference was made to the oldest recorded case of boycotting as occurring in 1221, citing “vol. 1 of the publication of the Selden Society, p. 115, case 178, Pleas of the Crown.” In *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811, 819 (C. C. Ohio, 1897), *State v. Glidden* was said to be the first American case in which the word is used. See, in *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 128; 30 Atl. 881, 891 (1894), reference to article in 19 *Irish Law Times*, 572, suggesting that the method had its inspiration in the

proceedings of excommunication practiced in ecclesiastical tribunals.

² The following are definitions of “boycott” (or “boycotting”): “To combine in refusing to work for, buy from, sell to, give assistance to, or have any kind of dealings with, and in preventing others from working for, buying from, selling to, assisting or having any kind of dealings with (a person or company), on account of political or other differences, or of disagreements in business matters, as a means of inflicting punishment, or of coercing or intimidating.” Century Dictionary. “A combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request made of him or them.” Anderson’s Law Dictionary. “A conspiracy formed and intended, directly or indirectly, to prevent the carrying on of any lawful business,

there is no differentiation between a boycott and the mere act of refusing to deal, or of inducing refusal to deal, already considered, for, as has been said, "a boycott might be initiated as well by a single person as by a combination."³ In this view the element of combination though usually present is not essen-

or to injure the business of any one, by wrongfully preventing those who would be customers, from buying anything from or employing the representatives of said business, by threats, intimidation or other forcible means." Black's Law Dictionary. "The withdrawal for a certain purpose of the patronage of the person or persons initiating it, and of as many others as he or they can induce to join them." E. P. Cheyney in 4 Pol. Sci. Quart. 274 (1889). In *Moores v. Bricklayers' Union*, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889), it was said: "The essential feature of (boycotting) is the exclusion of the employer from all communication with former customers and material-men, by threats of similar exclusion to the latter, if dealings are continued." In *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 738; 19 L. R. A. 387, 391 C. C. Ohio, 1893), it was said: "As usually understood, a boycott is a combination of many to cause a loss to one person, by coercing others against their will to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them." This definition was approved in *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 525; 77 N. W. 13, 24; 42 L. R. A. 407, 418; 74 Am. St. Rep. 421 (1898). In *Gray v. Building Trades Council*, 91 Minn. 171,

179; 97 N. W. 663, 666; 63 L. R. A. 753, 757; 103 Am. St. Rep. 477 (1903); *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997, 1003 (Supm. Ct. Mo., 1908), this definition was substantially adopted, it being said in *Gray v. Building Trades Council*, to also include "an organization formed to exclude a person from business relations with others by persuasion, intimidation and other acts which tend to violence and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs." In *Crump v. Commonwealth*, 84 Va. 927, 940; 6 S. E. 620, 627; 10 Am. St. Rep. 895, 906 (1888), it was said: "The essential idea of boycotting, whether in Ireland or the United States, is a confederation, generally secret, of many persons whose intent is to injure another by preventing any and all persons from doing business with him, through fear of incurring the displeasure, persecution and vengeance of the conspirators." See also *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 917; 28 C. C. A. 99, 104 (8th C., 1897); *My Maryland Lodge v. Adt*, 100 Md. 238; 59 Atl. 721; 68 L. R. A. 752 (1905); *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906); *State v. Van Pelt*, 136 N. C. 633, 665; 49 S. E. 177, 188; 68 L. R. A. 760, 772 (1904).

³ E. P. Cheyney, in 4 Pol. Sci. Quart. 274 (1889).

tial to the definition of a boycott. Regarding it, however, as essential, it is not essential that the combination be the result of any formal or written agreement.⁴

§ 25. **Boycott whether illegal apart from violence or acts producing fear of violence.**—Leaving out of consideration the special case of inducing to refuse to enter or continue in employment⁵ there is, in the view we have taken, nothing illegal in a boycott as just defined, at any rate, if the boycott is merely the natural incident or outgrowth of some lawful relation. That is to say there is nothing illegal in a boycott, apart from acts of violence or acts producing fear of violence.⁶ As already suggested with reference to the right of refusal to deal, it would seem that it might well be claimed that the right to institute a mere boycott “is a part of the liberty of action which the constitutions, State and Federal, guarantee to the citizen.”⁷ But what seems to be a contrary doctrine has come to rather extensively prevail. Thus it has been said that “boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every State of the United States where the question has arisen, unless it be in Minnesota, and they are held to be unlawful in England.”⁸ This doctrine

⁴ Webb v. Drake, 52 La. Ann. 290, 302; 26 So. 791, 795 (1899), where it was said: “That the matter was discussed between them is beyond all question, and each acted with knowledge that the other was acting upon the same lines, and for the accomplishment of the same purpose.”

⁵ See §§ 65, 66.

⁶ In accord with the text seem Lindsay v. Montana Federation of Labor, 96 Pac. 127 (Supm. Ct. Mont., 1908); Foster v. Retail Clerks’ Protective Assoc., 39 Misc. 48; 78 N. Y. Suppl. 860 (Supm. Ct., Sp. T., 1902); Mills v. U. S. Printing Co., 99 App. D. 605, 611; 91 N. Y. Suppl. 185, 189 (1904); Butterick Publishing Co. v. Typographical

Union No. 6, 50 Misc. 1; 100 N. Y. Suppl. 292 (Supm. Ct., Sp. T., 1906). See Tiedeman’s State and Federal Control of Persons and Property, § 115, p. 443. As to illegal acts incident to boycott, see §§ 73-77, 86.

⁷ See § 17.

For possible objections to constitutionality of legislation against boycotts, see under § 7, Aikens v. Wisconsin, 195 U. S. 194; 25 Supm. 3; 49 L. Ed. 154 (1904). As to effect of constitutional guarantee of free speech, etc., in determining propriety of injunction against boycotts, see § 92.

⁸ Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803, 819 (C. C. Ohio, 1894). The reference

is perhaps referable not so much to the view that a boycott as

probably is to *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223; 55 N. W. 1119 (1893); 21 L. R. A. 337; 40 Am. St. Rep. 319 (1893), with which compare, however, *Ertz v. Produce Exchange*, 79 Minn. 140; 81 N. W. 737; 48 L. R. A. 90; 79 Am. St. Rep. 433 (1900); *Gray v. Building Trades Council*, *infra*. In *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, the action condemned was referred to as a "boycott," though it was unnecessary to base the decision on that ground, especially as the boycotted party was not a complainant or otherwise a party to the action. Had the boycotted party been the complainant, the case would then have been similar to that under consideration in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912; 28 C. C. A. 99 (8th C., 1897). And a boycott as herein defined, seems to have been held actionable in *Quinn v. Leathem*, App. Cas. (1901) 495, that is to say, there was held actionable maliciously conspiring to induce a customer of the plaintiff not to deal with him, such customer being thus induced not to so deal. See also *O'Keeffe v. Walsh*, 2 Irish Rep. (1903) 681; *Boots v. Grundy*, 82 L. T. R. 769 (1900). As to application of § 3 of English Conspiracy & Protection of Property Act, see *Quinn v. Leathem* (p. 541).

In *Gray v. Building Trades Council*, 91 Minn. 171; 97 N. W. 663; 63 L. R. A. 753; 103 Am. St. Rep. 477 (1903), though all that was decided was that a boycott instituted against employers for the purpose of compelling the employment of union labor only was unlawful, the court seemed inclined to put the

decision on the ground that boycotts generally are illegal. See *Joyce v. Great Northern Ry. Co.*, 100 Minn. 225; 110 N. W. 975; 8 L. R. A. N. S. 756 (1907). To similar effect under like conditions seem *Loewe v. California State Federation of Labor*, 139 Fed. 71 (C. C. Cal., 1905); *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997 (Supm. Ct. Mo., 1908). So the decision seems to have rested on that ground in *My Maryland Lodge v. Adt*, 100 Md. 238; 59 Atl. 721; 68 L. R. A. 752 (1905), where was allowed a preliminary injunction against "in any manner boycotting the plaintiff or his manufactured goods, or any one for whom the plaintiff has worked, is now working, or shall hereafter work, or manufactured articles of such last-named person by reason of such work." There was also here enjoined following the delivery wagons of the plaintiff in the streets for the purpose of finding out where work was to be done; also going to, or sending any communication, letters or circulars to places of business, for the purpose of inducing not to deal with the plaintiff. In *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 122; 30 Atl. 881, 888 (1894), where an injunction was granted against boycotting the proprietors of a newspaper by labor unions, the only injury, so far as the complainants were concerned, was inducing persons to refuse to deal with them, there being concededly "no public disturbance, no physical injury, no direct threats of personal violence, or of actual attack on or destruction of tangible property as a means of intimidation or coercion." See also *Martin v. McFall*,

just defined is illegal, as to the view that it is inseparably con-

65 N. J. Eq. 91; 55 Atl. 465 (1903); Booth v. Burgess, 65 Atl. 226 (Ct. Ch. N. J. 1906; see under § 74). So under like conditions was held actionable the boycott of a hotel proprietor, made effectual by the announcement of intention not to patronize those patronizing him. Webb v. Drake, 52 La. Ann. 290; 26 So. 791 (1899; see § 33; see also, as to elements of damage). So in Boutwell v. Marr, 71 Vt. 1; 42 Atl. 607; 43 L. R. A. 803; 76 Am. St. Rep. 746 (1899), the boycott held illegal consisted of the action of an association, the only coercion, if any, consisting of the circumstance that a member not complying with resolutions thereof was subject to penalties under the by-laws. So in Wilson v. Hey, 232 Ill. 389; 83 N. E. 928; 16 L. R. A. N. S. 85; 122 Am. St. Rep. 119 (1908); Ertz v. Produce Exchange, 79 Minn. 140; 81 N. W. 737; 48 L. R. A. 90; 79 Am. St. Rep. 433 (1900), a boycott was held actionable in the absence of accompanying acts of coercion. In Old Dominion Steamship Co. v. McKenna, 30 Fed. 48 (C. C. N. Y., 1887), an action was held maintainable for a boycott of the plaintiff's business by sending notices to his customers, designed to intimidate them from dealing with it, by threat of *loss and expense*, whereby various persons were so intimidated into refusing to deal with the plaintiff. Such acts were said to be not merely actionable, but misdemeanors at common law and under N. Y. Penal Code, § 168. This illustrates a class of cases wherein it is difficult to determine whether the threat of "loss and ex-

pense" produced a fear of *violence* or merely of loss of custom. If of violence, the case was probably rightly decided; if merely of loss of custom, in our view, wrongly. See § 6.

See, on the general subject, articles in 33 Am. Law Rev. 885 (1899); 34 Id. 161, 468 (1900) by S. D. Thompson; 40 Id. 196 (1906) by J. W. Bryan; 41 Id. 336 (1907) by R. L. McWilliams; 42 Id. 200 (1908) by C. R. Darling; 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen; 18 Id. 423 (1905) by E. W. Huffcut; Id. 444 (1905) by W. D. Lewis; 43 Am. Law Reg. N. S. 73 (1904) by C. R. Darling; 44 Id. 465 (1905) by W. D. Lewis.

As to legality of boycott as incident of strike, see Krug Furniture Co. v. Berlin Union, 5 Ont. Law Rep. 463 (1903).

By Ill. R. S. (Starr & Curtis' ed., 1896), c. 38, § 96, it is a crime to conspire to establish "a so-called boycott or blacklist." See Piano & Organ Workers' Union v. Piano & Organ Supply Co., 124 Ill. App. 353 (1906).

By Ala. Crim. Code (1907), § 6396, it is made a criminal act to "print or circulate any notice of boycott, boycott cards, stickers, dodgers or unfair lists, publishing or declaring that a boycott or ban exists or has existed, or is contemplated against any person, firm or corporation doing a lawful business, or publishing the name of any judicial officer or other public official upon any blacklist, unfair list or other similar list because of any lawful act or decision of such official." To very similar effect is Colo. R. S. (1908), § 398 by

nected with acts that are indisputably illegal.⁹ What seems to us to be a better view has been thus expressed: "The verb 'to boycott' does not necessarily signify that the doers employ violence, intimidation or other unlawful coercive means, but it

which it is likewise made a criminal act "to loiter about or patrol the streets, alleys, roads, highways, trails or place of business of any person, firm or corporation engaged in any lawful business, for the purpose of influencing or inducing others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation, or to picket the works, mine, building or other place of business or occupation of such other person, persons, firm or corporation, for the purpose of obstructing or interfering with or injuring any lawful business, work or enterprise, provided that nothing herein shall prevent any person from soliciting trade, custom or business for a competitive business."

As to boycott being included within ordinary anti-trust act as "combination for the purpose of creating or carrying out a restriction in trade or commerce," see under Ohio (§ 227); as combination "to prevent others from conducting or carrying on the same business," or which tends "to prevent or preclude a free and unrestricted competition among themselves or others or the public generally," see under Neb. (§ 222). See, also, § 21 and under Mo. (§ 220); also under Federal anti-trust act, § 191.

For prohibition against boycotting electors, see Miss. Code (1906), § 1062.

As to application of U. S. R. S. § 5480, to use of mails for purpose of boycotting, see U. S. v.

Raish, 163 Fed. 911 (D. C. Ill., 1908).

⁹ See definitions, § 24. In *State v. Glidden*, 55 Conn. 46, 77; 8 Atl. 890, 897; 3 Am. St. Rep. 23, 35 (1887), after referring to the account of the origin of the word (see § 24) it was said: "If this is a correct picture, the thing we call a boycott originally signified violence, if not murder;" also: "Instances are not wanting in our own country where the boycott has been attended with more or less violence; and it cannot be denied that the natural tendency is, especially when applied by the ignorant and vicious, to attempt to make it successful by force. It too often leads to serious disturbances of the peace." So in *Brace v. Evans*, 3 Ry. & Corp. L. J. 561 (*Allegheny Co., Pa., Com. Pl.*, 1888), an injunction was allowed employers against a boycott where, among the acts complained of were: the issue of circulars requesting all persons to cease patronizing them, some of such circulars having printed in large letters, "Boycott Brace Bros."; visiting their customers; inducing them to refrain from patronizing them; conspicuously displaying sign with words "Headquarters Brace Bros. Boycott Committee"; following their wagons, with banners having the words "Boycott Brace Bros."; requesting their agents to cease dealing with them, and boycotting them on their refusal; distributing circulars and thereby collecting noisy crowds in front of their place

may be correctly used in the sense of the act of a combination in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the welfare of the members of the combination, or some of them, or grants concessions which are deemed to make for that purpose.”¹⁰

§ 26. **Relation justifying boycott.**—It has frequently been

of business. The decision rested on the theory that the word “boycott” by its very definition includes acts which tend to violence, the court saying: “The use of the word ‘boycott’ is in itself a threat.” This decision was applied in *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 143; 12 L. R. A. 193, 199 (C. C. Ohio, 1891); *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 121; 30 Atl. 881, 888 (1894); *Beck v. Railway Teamsters’ Protective Union*, 118 Mich. 497, 525; 77 N. W. 13, 24; 42 L. R. A. 407, 418; 74 Am. St. Rep. 421 (1898). See also, *Matthews v. Shankland*, 25 Misc. 604; 56 N. Y. Suppl. 123 (Supm. Ct., Sp. T., 1898); *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280, 292; 71 S. W. 455, 459 (1902); *Gray v. Building Trades Council*, 91 Minn. 171, 181; 97 N. W. 663, 666; 63 L. R. A. 753, 758; 103 Am. St. Rep. 477 (1903). In *Gray v. Building Trades Council*, however, the boycott held illegal involved no violence or threats of violence, being made effective by “threats” or notification that those thus threatened or notified would be unable to procure men sufficient for the purpose of certain construction in which they were interested. In *Beck v. Railway Teamsters’ Protective Union*, where the distribution of a boycotting circular was en-

joined, it was said (118 Mich. 519; 77 N. W. 22; 42 L. R. A. 416): “When these defendants went in numbers of from five to twenty-five along the streets, and into the business houses of complainants’ customers, distributing these circulars which contained false statements, and which commenced and closed with the words ‘Boycott B. & Sons,’ they intended in emphatic manner to convey to the customers of complainants that they would be treated in like manner unless they ceased to trade with complainants. The distance that this was done from the mill of the complainants does not detract from its character or harmfulness. It was just as effective and as wrong when done 1,000 feet from the mill as when done 10 feet from it. The act itself, not the distance, determines its character. . . . The defendants by their conduct gave every laborer and customer of complainants their definition of what they understood the term ‘boycott’ to mean. It would be idle to argue that these circulars were not intended as a menace, intimidation and coercion. They were so used, and were ‘a standing menace’ to every one who wished to work for or trade with complainants.”

¹⁰ *Mills v. U. S. Printing Co.*, 99 App. D. 605, 611; 91 N. Y. Suppl. 185, 189 (1904). This was quoted

held or assumed to be necessary that there exist some special relation to justify a boycott,¹¹ and boycotts that have been held legal have, as a rule, been incidents or outgrowths of some special relation, commonly that of trade competitor. What has already been said with reference to a relation justifying a refusal to deal will, generally speaking, apply here.

and applied in *Lindsay v. Montana Federation of Labor*, 96 Pac. 127 (Supm. Ct. Mont., 1908).

¹¹ See *Mills v. U. S. Printing Co.*, 99 App. D. 605, 611; 91 N. Y. Suppl. 185, 188 (1904).

CHAPTER VI

INDUCING BREACH OF CONTRACT

- § 27. Inducing breach of contract.
28. Justifying relation.
29. Malicious intent.
30. Fraud or misrepresentation.

§ 27. **Inducing breach of contract.**—As with the right to induce refusal to deal, so on principle it would seem clear enough that there is nothing inherently or necessarily illegal in inducing another to break his contract.¹ Nevertheless within a comparatively recent period has been developed the doctrine that such inducing is illegal,² this doctrine being merely an expan-

¹ In accord with the view expressed in the text is *Boyson v. Thorn*, 98 Cal. 578; 33 Pac. 492; 21 L. R. A. 233 (1893), where it was held broadly that no action lies against one "who, from malicious motives, but without threats, violence, fraud, falsehood, deception or benefit to himself, induces another to violate his contract with the plaintiff." So in *Ashley v. Dixon*, 48 N. Y. 430; 8 Am. Rep. 559 (1872), it was held broadly that no action lies in such case in the absence of *fraud or misrepresentation*.

To the same effect, *Kline v. Eubanks*, 109 La. 242; 33 So. 211 (1902); *Wolf v. New Orleans Tailor-Made Pants Co.*, 113 La. 388; 37 So. 2; 67 L. R. A. 65 (1904); *Daly v. Cornwell*, 34 App. D. 27; 54 N. Y. Suppl. 107 (1898), though see *McDonald v. Edwards*, 20 Misc.

523; 46 N. Y. Suppl. 672 (Supm. Ct., Sp. T., 1897).

² So held in *Lumley v. Gye*, 2 El. & Bl. 216 (1853); *Bowen v. Hall*, 6 Q. B. D. 333 (1881); *Heath v. American Book Co.*, 97 Fed. 533 (C. C. W. Va., 1899); *Miles Medical Co. v. Platt*, 142 Fed. 606 (C. C. Ill., 1906); *Miles Medical Co. v. Jaynes Drug Co.*, 149 Fed. 838 (C. C. Mass., 1906); *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. 824; 86 C. C. A. 648 (1st C., 1908); *Sperry & Hutchinson Co. v. Louis Weber & Co.*, 161 Fed. 219 (C. C. Ill., 1908); *Motley v. Detroit Steel & Spring Co.*, 161 Fed. 389 (C. C. N. Y., 1908); *Mathoney v. Roberts*, 110 S. W. 225 (Supm. Ct. Ark., 1908); *Doremus v. Hennessy*, 176 Ill. 608; 52 N. E. 924; 43 L. R. A. 797; 68 Am. St. Rep. 203 (1898); *Guethler v. Altman*, 26 Ind. App. 587; 60 N. E.

sion of the special doctrine that it is illegal to induce an em-

355; 84 Am. St. Rep. 313 (1901); Gore v. Condon, 87 Md. 368; 39 Atl. 1042; 40 L. R. A. 382; 67 Am. St. Rep. 352 (1898; inducing tenants to refuse to pay rent); Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556; 69 Atl. 405; 16 L. R. A. N. S. 746 (1908); Walker v. Cronin, 107 Mass. 555, 567 (1871); Beekman v. Marsters, 195 Mass. 205; 80 N. E. 817; 11 L. R. A. N. S. 201; 122 Am. St. Rep. 232 (1907); Jones v. Stanly, 76 N. C. 355 (1877); Raymond v. Yarrington, 96 Tex. 443; 73 S. W. 800; 62 L. R. A. 962; 97 Am. St. Rep. 914 (1903); Brown Hardware Co. v. Indiana Stove Works, 96 Tex. 453; 73 S. W. 800 (1903); reversing 69 S. W. 805 (Tex. Civ. App., 1903); Thacker Coal Co. v. Burke, 59 W. Va. 253; 53 S. E. 161; 5 L. R. A. N. S. 1091 (1906); Martens v. Reilly, 109 Wis. 464; 84 N. W. 840 (1901).

See Proctor & Collier Co. v. Mahin, 93 Fed. 875 (C. C. Ill., 1899); Wells & Richardson Co. v. Abraham, 146 Fed. 190 (C. C. N. Y., 1906); Bobbs-Merrill Co. v. Straus, 147 Fed. 15; 77 C. C. A. 607; 15 L. R. A. N. S. 766 (2d C., 1906); Le nard v. Abner-Drury Brewing Co., 25 App. D. C. 161 (1905); Southern Ry. Co. v. Chambers, 126 Ga. 404; 55 S. E. 37; 7 L. R. A. N. S. 926 (1906); Perkins v. Pendleton, 90 Me. 166; 38 Atl. 96; 60 Am. St. Rep. 252 (1897); May v. Wood, 172 Mass. 11; 51 N. E. 191 (1898); Garst v. Charles, 187 Mass. 144; 72 N. E. 839 (1905); Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235; 112 N. W. 940 (1907); Joyce v. Great Northern Ry. Co., 100 Minn. 225;

110 N. W. 975; 8 L. R. A. N. S. 756 (1907); Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 763; 53 Atl. 230, 232 (1902); Transportation Co. v. Standard Oil Co., 50 W. Va. 611; 40 S. E. 591; 56 L. R. A. 804; 88 Am. St. Rep. 895 (1902).

By Tenn. L. 1907, c. 154, it is unlawful to "by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach of violation, refusal, or failure to perform any lawful contract by any party thereto." Provision is made for liability "in treble the amount of damages."

The same general rule of liability was applied to carrying on the business of purchasing and selling non-transferable reduced rate railroad tickets for profit, to the injury of the company issuing such tickets, in Bitterman v. Louisville & Nashville R. R. Co., 207 U. S. 205; 28 Supm. 91; 52 L. Ed. 171 (1907); affirming Louisville & N. R. Co. v. Bitterman, 144 Fed. 34; 75 C. C. A. 192 (5th C., 1906); on appeal from 128 Fed. 176 (C. C. La., 1904). To similar effect, Nashville, Chattanooga, etc., Ry. Co. v. McConnell, 82 Fed. 65, 71 (C. C. Tenn., 1897); Illinois Central R. Co. v. Caffrey, 128 Fed. 770 (C. C. Mo., 1904); Pennsylvania Co. v. Bay, 150 Fed. 770 (C. C. Ill., 1906); Schubach v. McDonald, 179 Mo. 163; 78 S. W. 1020; 65 L. R. A. 136; 101 Am. St. Rep. 452 (1903); writ of error dismissed in 196 U. S. 644; 25 Supm. 797; 49 L. Ed. 632 (1905); Kinner v. Lake Shore & M. S. Ry. Co., 69 Ohio St. 339; 69 N. E. 614 (1904); Lytle v. Galveston, H. & S. A. Ry. Co., 100 Tex.

ployee to quit his employment.³ The objections to such a doctrine on principle are serious and have been clearly seen. It violates the fundamental maxim that only the proximate, and not the remote, cause of an injury is to be considered by the

292; 99 S. W. 396; 10 L. R. A. N. S. 437 (1907); 100 S. W. 199 (Tex. Civ. App., 1907). See also *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689 (C. C. N. Y., 1901); *N. Y. Central, etc., R. R. Co. v. Reeves*, 41 Misc. 490; 85 N. Y. Suppl. 28 (Supm. Ct., Sp. T., 1903).

In *Chesapeake & O. Coal Agency Co. v. Fire Creek Coal, etc., Co.*, 119 Fed. 942 (C. C. W. Va., 1902); affirmed in *Carroll v. Chesapeake & O. Coal Agency Co.*, 124 Fed. 305; 61 C. C. A. 49 (4th C., 1903), the same rule of liability was held applicable to the acts of strikers and members of the organization conducting and controlling the strike, in preventing by intimidation persons from entering the employment of one who was thereby prevented from fulfilling contracts with the plaintiff.

See, as to liability to landlord for ouster of tenant, *Walden v. Conn*, 84 Ky. 312; 1 S. W. 537; 4 Am. St. Rep. 204 (1886); *Aldridge v. Stuyvesant*, 1 Hall (N. Y.), 210 (1828).

As to sufficiency of evidence of valid subsisting contract, see *Collins v. American News Co.*, 34 Misc. 260; 69 N. Y. Suppl. 638; affirmed in 68 App. D. 639; 74 N. Y. Suppl. 1123 (1902).

See, as to sufficiency of allegations of inducing breach of contract,

Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. 163; 44 C. C. A. 426; 62 L. R. A. 673 (8th C., 1900); certiorari denied in 181 U. S. 617; 21 Supm. 922; 45 L. Ed. 1029 (1901).

As to necessity of proving actual damage, see *Exchange Telegraph Co. v. Gregory*, 1 Q. B. (1896) 147; *Passaic Print Works v. Ely & Walker Dry Goods Co.*, *supra*.

As to remedy by injunction, see § 96.

For illustrations of how "a party may be the means of causing a contract to be broken, and still not be liable," see *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 567; 69 Atl. 405, 409; 16 L. R. A. N. S. 746, 755 (1908).

Though some doubt may have been thrown on the doctrine by *Allen v. Flood*, App. Cas. (1898), 1, 123, 151, 171, it was approved in *Quinn v. Leatham*, App. Cas. (1901) 495, 510, where, however, the point does not seem to have been necessary to the decision. (See pp. 513, 525). It was here said (p. 509) of *Temper-ton v. Russell*, that it "was not overruled in *Allen v. Flood*, nor is the authority of *Temper-ton v. Russell*, in my opinion, shaken in the least by the decision in *Allen v. Flood*." It was said by Lord Lindley (p. 535), that the principle involved in *Lumley v. Gye* "cannot

³ See § 65; *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509; 50 S. E. 353; 69 L. R. A. 90; 106 Am. St. Rep. 137 (1905);

Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556; 69 Atl. 405; 16 L. R. A. N. S. 746 (1908).

law. Furthermore, the legal remedy against the party breaking the contract is ample.⁴

§ 28. **Justifying relation.**—As with inducing refusal to deal, so it may be said here that if the right to induce a breach of contract be not an absolute one, that is, if it be necessary that there exist some special relation for the purpose of justifying such inducing, we may apply the test already indicated, namely, *whether the act was the natural incident or outgrowth of some lawful relation.*⁵ The relations of trade competitor and of em-

be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts.

. . . Temperton v. Russell ought to have been decided, and may be upheld on this principle." The doctrine was also applied in Read v. Friendly Society of Operative Stonemasons, 1 K. B. (1902) 732, 737; South Wales Miners' Federation v. Glamorgan Coal Co., App. Cas. (1905) 239; affirming Glamorgan Coal Co. v. South Wales Miners' Federation, 2 K. B. (1903) 545, 573, 576, which reversed 1 K. B. (1903) 118. See notes in 19 Law Quart. Rev. 1, 116 (1903); 20 Id. 1 (1904); 2 Mich. Law Rev. 305 (1903-4).

As to Trade Disputes Act of 1906, see § 67.

In Doremus v. Hennessy, 176 Ill. 608; 52 N. E. 924; 43 L. R. A. 797; 68 Am. St. Rep. 203 (1898), Allen v. Flood was distinguished as a case where there was no contract the breach of which was induced.

See, on the general subject, note in 32 Cent. Law Jour. 275 (1891); articles in 40 Id. 86 (1895) by A. L. Tidd; 21 Am. Law Rev. 764 (1887) by J. H. Wigmore; 33 Id. 885 (1899) by S. D. Thompson; 37 Am. Law Reg. N. S. 273 (1898) by E. W. Huffcut; 42 Id. 125 (1903) by W. D. Lewis; 18 Harv. Law Rev. 423 (1905) by E. W. Huffcut.

⁴ See Vicars v. Wilcocks, 8 East, 1 (1806), and note thereto in 3 Smith's Leading Cases, 1807 (9th Am. Ed.); also the elaborate dissenting opinion of Coleridge, J., in Lumley v. Gye, 2 El. & Bl. 216 (1853); also dissenting opinion of Coleridge, J., the younger, in Bowen v. Hall, 6 Q. B. D. 333 (1881); also Van Horn v. Van Horn, 52 N. J. Law, 284; 20 Atl. 485; 10 L. R. A. 184 (1890); Lynch v. Knight, 9 House of Lords Cases, 577 (1861).

Compare National Phonograph Co. v. Edison-Bell Consolidated, etc., Co., 96 L. T. R. 218 (1906).

In Doremus v. Hennessy, *supra*, the objection that the act of inducing was not the proximate cause of the breach of contract, was overruled, it being held properly found as a matter of fact and not of law, that such act was the proximate cause.

⁵ Substantially in accord with the view stated in the text seems Glamorgan Coal Co. v. South Wales Miners' Federation, 1 K. B. (1903) 118, where the test applied was in effect, whether the act of inducing was *the natural incident or outgrowth of the relation of employee.*

ployer and employee will hereafter be considered, each in its proper connection.

§ 29. **Malicious intent.**—As with inducing refusal to deal, so here, as just seen, if the inducing a breach of contract be not inherently legal, the test of legality is whether the act was

See § 68. Although this decision was reversed in 2 K. B. (1903) 545, holding that no sufficient justification there existed, it seemed clearly recognized that there may well be such a justification. It was said by Romer, J. (p. 573): "When a person has knowingly procured another to break his contract, it may be difficult under the circumstances to say whether or not there was 'sufficient justification or just cause' for his act. . . . In analyzing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; *the relation of the person procuring the breach to the person who breaks the contract*; and, I think also, to the object of the person in procuring the breach." So it was said by Stirling, J. (p. 577): "That interference with contractual relations known to the law may in some cases be justified is not, in my opinion, open to doubt. . . . It would no doubt be desirable if a general rule could be formulated which would determine in what cases such a justification exists; but no such rule can be laid down, and I doubt whether this can be done." This decision was affirmed in *South Wales Miners' Federation v. Glamorgan Coal Co.*, App. Cas. (1905) 239. As to Trade Disputes Act of 1906, see § 67. See also *Booth v. Burgess*, 65 Atl. 226, 229 (Ct. Ch. N. J., 1906); *Knick-*

erbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 566; 69 Atl. 405, 409; 16 L. R. A. N. S. 746, 754 (1908).

As illustrating the extent to which this element of relation has been ignored by the courts, it is interesting to compare *Boyson v. Thorn*, 98 Cal. 578; 33 Pac. 492; 21 L. R. A. 233 (1893), with *Jones v. Stanley*, 76 N. C. 355 (1877). In the former the agent of a hotel proprietor induced him to break his contract to furnish accommodations in the hotel. What the relation of the agent was does not otherwise appear. In the latter the president, who was also the superintendent of a railroad corporation, induced it to break its contract for the transportation of railroad ties. Here too the relation of the president does not otherwise appear. In these two cases the relations of the parties were very similar. In neither was the relation discussed as bearing on the question of liability. In *Walker v. Cronin*, 107 Mass. 555 (1871), where the general subject was very elaborately discussed, there is nothing to show what the relation of the defendant was, nor does it seem to have occurred to the court or any one else connected with the case, that it was at all worth the while to inquire.

See editorial note in 16 Harv. Law Rev. 299 (1902-3); 1 Tiedeman's *State & Federal Control of Persons & Property*, § 115, p. 437.

the natural incident or outgrowth of some lawful relation. And in the view already taken there should be entirely ignored as a test of liability, malice or malicious intent; that is, malice in fact, as distinguished from malice in law,⁶ though there is observable a tendency to apply such test.⁷

⁶ In *South Wales Miners' Federation v. Glamorgan Coal Co.*, App. Cas. (1905) 239; affirming *Glamorgan Coal Co. v. South Wales Miners' Federation*, 2 K. B. (1903) 545, in applying the rule that such inducing is illegal, it was said to be settled that "malice in the sense of spite or ill-will is not the gist of such an action." So in another opinion: "It conduces to clearness in discussing such cases as these to drop the word 'malice' altogether, and to substitute for it the meaning which is really intended to be conveyed by it."

See remarks of Lord Esher in *Flood v. Jackson*, 2 Q. B. (1895), 21; reversed in *Allen v. Flood*, App. Cas. (1898), 1.

In *Banks v. Eastern Ry. & Lumber Co.*, 46 Wash. 610; 90 Pac. 1048; 11 L. R. A. N. S. 485 (1907), such inducing was held not actionable because done with malice. See also *Beekman v. Marsters*, 195 Mass. 205; 80 N. E. 817; 11 L. R. A. N. S. 201; 122 Am. St. Rep. 232 (1907); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 567; 69 Atl. 405, 409; 16 L. R. A. N. S. 746, 754 (1908; see as whether exemplary damages may be allowed).

In *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 205, 223; 28 Supm. 91, 97; 52 L. Ed. 171 (1907), in applying the rule of liability to "the carrying on of the business of purchasing and selling

non-transferable reduced rate railroad tickets for profit, to the injury of the railroad company issuing such tickets" (see § 27), it was said: "It is not necessary that the ingredient of actual malice in the sense of personal ill-will should exist to bring this controversy within the doctrine. The wanton disregard of the rights of a carrier causing injury to it, . . . constitute legal malice." This was followed in *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. 824; 86 C. C. A. 648 (1st C., 1908). So the existence of actual malice was held unnecessary in *Motley v. Detroit Steel & Spring Co.*, 161 Fed. 389 (C. C. N. Y., 1908). See also *Nashville, Chattanooga, etc., Ry. Co. v. McConnell*, 82 Fed. 65, 71 (C. C. Tenn., 1897).

⁷ See § 11; *Temperton v. Russell*, 1 Q. B. (1893) 715; *Read v. Friendly Society of Operative Stonemasons*, 1 K. B. (1902) 732; *Morehouse v. Terrill*, 111 Ill. App. 460 (1903); *Legriss v. Marcotte*, 129 Ill. App. 67 (1906); *Beattie v. Callanan*, 82 App. D. 7; 81 N. Y. Suppl. 413 (1903). But malice in this sense seems in some instances to have been regarded as including acts committed primarily with the intent to benefit one's self, rather than to injure another. See § 12. But see *Glamorgan Coal Co. v. South Wales Miners' Federation*, 1 K. B. (1903) 118; reversed, however, in 2 K. B. (1903) 545.

§ 30. **Fraud or misrepresentation.**—What has just been said does not, necessarily at least, apply to the case of inducing by *fraud or misrepresentation*, nonfulfillment by a third person of his contract.⁸ Such cases have been regarded as standing on a different basis from those already considered, though, perhaps, even as to such cases, the theoretical objections already stated apply.

⁸ Such inducing was held actionable in *Angle v. Chicago, St. Paul, etc., Ry. Co.*, 151 U. S. 1, 13; 14 Supm. 240, 245; 38 L. Ed. 55 (1894); *Morehouse v. Terrill*, 111 Ill. App. 460 (1903); *Morgan v. Andrews*, 107 Mich. 33; 64 N. W. 869 (1895); *Lally v. Cantwell*, 30 Mo. App. 524 (1888); *Rice v. Manley*, 66 N. Y. 82; 23 Am. Rep. 30 (1876); *Benton v. Pratt*, 2 Wend. (N. Y.) 385; 20 Am. Dec. 623 (1829); *Snow v. Judson*, 38 Barb. (N. Y.) 210 (1862); *American Law*

Book Co. v. Edward Thompson Co., 41 Misc. 396; 84 N. Y. Suppl. 225 (Supm. Ct., Sp. T., 1903); *Green v. Button*, 2 Crompton, M. & R. 707 (1835); *National Phonograph Co. v. Edison-Bell Co.*, 1 Ch. D. (1908) 335.

Compare *Chambers v. Baldwin*, 91 Ky. 121; 15 S. W. 57; 11 L. R. A. 545; 34 Am. St. Rep. 165 (1891); *Hollenbeck v. Ristine*, 114 Iowa, 358; 86 N. W. 377 (1901); *American Ins. Co. v. France*, 111 Ill. App. 382 (1903).

CHAPTER VII

RELATION OF TRADE COMPETITOR AS JUSTIFYING INJURY

§ 31. Relation of trade competitor as justifying injury.

32. Malicious intent.
33. Inducing refusal to deal.
34. Boycott by trade competitor.
35. Inducing breach of contract.

§ 31. Relation of trade competitor as justifying injury.—In all ages those engaged in trade have striven for success at the expense of their rivals. In ruder ages, as indeed still is the case in the newer and comparatively unsettled regions open to trade, traders frequently resort to acts, not alone of fraud, but of violence, even to robbery and murder. Such acts are condemned by the common law of England, as indeed by the law of every civilized nation.¹ There remain, however, many acts which, like those just considered, are done with intent to injure a trade rival, and yet are generally regarded as entirely lawful.²

¹ As instances are given "fraud, misrepresentation, intimidation, coercion, obstruction or molestation of the rival or his servants or workmen, and the procurement of violation of contractual relations." *Macaulay v. Tierney*, 19 R. I. 255; 33 Atl. 1; 37 L. R. A. 455; 61 Am. St. Rep. 770 (1895). Not all of the instances here given are, however, beyond the realm of debate; for instance, "the procurement of violation of contractual relations." See c. VI.

In *Hubbuck v. Wilkinson*, 1 Q. B. D. (1899) 86, a statement by a trader that his own goods were superior to those of a competitor, was

held not actionable, even if untrue and causing loss.

In *Ajello v. Worsley*, 1 Ch. (1898) 274, an injunction was refused against a dealer advertising for sale goods manufactured by the plaintiff, though without having such in his possession. The court made the distinction between the case under consideration, as one of an untrue statement relating to the defendant's own business, and cases of untrue statements regarding the plaintiff's business.

² The legality of such acts was very early established. Thus, in a case decided in 1410 (11 Henry 4, fol. 47, pl. 21), referred to fre-

What is the test of separation between these classes? If the doctrine already contended for be correct, namely, that the test of liability for an act producing injury is in no case that of malice or malicious intent, but purely whether the act was the natural incident or outgrowth of some lawful relation, we may state, by way of application of this doctrine to the relation of competitor in trade, that *the existence of the relation of trade competitor justifies acts that are the natural incident or outgrowth of such relation, whether or not done with the direct intent to injure one's rival.*³ In this view, acts that are

quently in *Allen v. Flood*, App. Cas. (1898), 1, and holding that a schoolmaster setting up a school to the damage of an ancient school, whereby the scholars were allured from the old school to come to his, committed no actionable wrong. So it was said in *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 134; 38 Am. Dec. 346, 359 (1892): "We think that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet, so far from being criminal or unlawful, the object may be highly meritorious and public-spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment." To similar effect *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*, 165 Ind. 421; 75 N. E. 877; 2 L. R. A. N. S. 788 (1905); *Walker v. Cronin*, 107 Mass. 555, 564 (1871); *Martell v. White*, 185 Mass. 255, 260; 69 N. E. 1085, 1087; 64 L. R. A. 260, 263; 102 Am. St. Rep. 341 (1904); *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223, 233; 55 N. W. 1119, 1121; 21 L. R. A. 337, 339; 40 Am. St. Rep. 319 (1893);

National Protective Assoc. v. Cumming, 170 N. Y. 315, 330; 63 N. E. 369, 373; 58 L. R. A. 135, 142; 88 Am. St. Rep. 648 (1902); *Macauley v. Tierney*, supra; *Curran v. Treleaven*, 2 Q. B. D. (1891) 560; *Mogul S. S. Co. v. McGregor*, infra.

³ This doctrine seems clearly recognized in *London Guarantee Accident Co. v. Horn*, 206 Ill. 493; 69 N. E. 526; 99 Am. St. Rep. 185 (1903), where, however, the relation of trade competitor was held not to exist for the purpose of justifying inducing discharge from employment. See § 71.

And with the statement in the text, compare the following language in the dissenting opinion of Holmes, J., in *Vegelahn v. Guntner*, 167 Mass. 92, 106; 44 N. E. 1077, 1081; 35 L. R. A. 722, 726; 57 Am. St. Rep. 443 (1896): "The policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done not for its own sake, but as an *instrumentality in reaching the end of victory in the battle of trade*. In such a case it cannot matter whether the plaintiff is the only rival of the defendant, and so is

not the natural incident or outgrowth of such relation are not justified. Or we may express the distinction as one between "fair" and "unfair" competition. Thus, the acts of fraud and violence just considered do not, in any proper sense of the words, come under the description of "fair competition," or of "natural incidents or outgrowths" of the relation of trade competitor.⁴ On the other hand, there are acts that come so clearly under such description that their legality is generally conceded. We may cite by way of illustration, setting up an opposition line of conveyance, or rival hotel in the same town, introducing improvements,⁵ and generally the manifold devices involved in modern methods of advertising. But there is a border class of cases as to which has existed considerable difference of judicial opinion. The test that we consider the proper one to apply to every such case (ignoring entirely the existence or non-existence of *malice* or *malicious intent*), namely, whether the act is *a natural incident or outgrowth of the relation of trade competitor*, may not always be easy to apply to the complicated facts

aimed at specifically, or is one of a class all of whom are hit. The only debatable ground is *the nature of the means by which such damage may be inflicted.*"

In *Doremus v. Hennessy*, 176 Ill. 608; 52 N. E. 924; 43 L. R. A. 797; 68 Am. St. Rep. 203 (1898), where certain acts of trade competitors were held actionable, the decision is to be sustained, if at all, by an application of the test indicated in the text. The court did not, however, apply such test, but proceeded on the ground that the acts were *wrongful* acts done to the detriment of the *right* of the plaintiff, and therefore malicious and actionable. Beyond this unsatisfactory test of liability none is indicated.

⁴ What we may call the doctrine of "unfair competition" is as yet comparatively in its infancy. With-

in the scope of such competition fall a class of cases that increasingly attract attention, and involve what are called in *Browne on Trade-marks*, "rights analogous to those of trade-marks." (See 2d ed., §§ 521-564.) On this subject see articles in 4 Harv. Law Rev. 321 (1891) by G. D. Custano; 5 Id. 139 (1891) by Rowland Cox; 10 Id. 275 (1896) by O. R. Mitchell; 12 Id. 243 (1898-9) by W. L. Putnam; 16 Id. 272 (1902-3) by E. R. Coffin; 13 Law Quart. Rev. 156 (1897) by J. F. Iselin.

⁵ See *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111; 38 Am. Dec. 346 (1842); *Van Horn v. Van Horn*, 56 N. J. Law, 318, 323; 28 Atl. 669, 670 (1894); *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 116; 30 Atl. 881, 886 (1894).

of a particular case; but it does not seem practicable to lay down a more precise rule.⁶ In this connection it has been said:⁷ "Here, as in most cases where there is a conflict between two important principles, either of which is sound and to be sustained within proper bounds, but each of which must finally yield to some extent to the other, it frequently is not possible by a gen-

⁶ A notable instance of acts of trade competitors held to constitute no actionable injury appears in *Mogul S. S. Co. v. McGregor*, App. Cas. (1892), 25, which affirmed 23 Q. B. D. 598 (1889), which had affirmed 21 Id. 544 (1888); and see prior decision in 15 Id. 476 (1885). The case is remarkable for the number of opinions delivered in its various stages, and has attracted wide attention, though, as pointed out elsewhere (see § 117), it is not, as sometimes supposed, an authority as to the validity of contracts in restriction upon competition. The acts complained of were those of "an associated body" of owners of steam vessels, who endeavored to obtain shipments for such vessels to the exclusion of others, by charging to those who would deal exclusively with them cheaper rates of freight than their competitors were willing to accept. This decision was applied under very similar conditions in *Lough v. Outerbridge*, 143 N. Y. 271, 283; 38 N. E. 292, 296; 25 L. R. A. 674, 679; 42 Am. St.

Rep. 712 (1894). See editorial note in 18 Quart. Law Rev. 1 (1902). As to conditions of liability of association composed of representatives of certain fire insurance companies, to company not a member of such association, see *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. 310 (C. C. Cal., 1895), of which decision it was said in *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 451; 41 S. E. 553, 562; 57 L. R. A. 547, 558; 90 Am. St. Rep. 126 (1902): "Here there was no effort to drive out of business companies not members, further than non-intercourse, and not having the same agents. So far as the enforcing of these provisions by a penalty is concerned, the decision is in conflict with *Boutwell v. Marr*, 71 Vt. 1; 42 Atl. 607; 43 L. R. A. 803; 76 Am. St. Rep. 746 (1899)." In *Bowen v. Matheson*, 14 Allen (Mass.) 499 (1876), no action was held to lie in favor of a shipping master against those who formed an association to control the business of the shipping masters of a certain local-

⁷ *Martell v. White*, 185 Mass. 255, 258; 69 N. E. 1085, 1087; 64 L. R. A. 260, 262; 102 Am. St. Rep. 341 (1904), where, with reference to the means allowable, it was said (185 Mass. 260; 69 N. E. 1087; 64 right of competition rests upon the L. R. A. 263): "It is a right which is to be exercised with reference to the existence of a similar right on

the part of others. The trader has not a free lance. Fight he may, but as a soldier, not as a guerrilla. The doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make

eral formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison, to establish points through which at least the

ity, though the effect of their action was to break up his business. See comments on *Bowen v. Matheson*, in *Pickett v. Walsh*, 192 Mass. 572, 586; 78 N. E. 753, 759; 6 L. R. A. N. S. 1067, 1080; 116 Am. St. Rep. 272 (1906).

In *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 449; 41 S. E. 553, 561; 57 L. R. A. 547, 557; 90 Am. St. Rep. 126 (1902), it was said that *Bowen v. Matheson* "is not a well-considered case, reviewing none of the authorities (but one being cited), and decides only as to certain allegations on demurrer." See also 1 *Eddy on Combinations*, § 571; *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 325; 63 N. E. 369, 371; 58 L. R. A. 135, 140; 88 Am. St. Rep. 648 (1902). In *Martell v. White*, 185 Mass. 255, 263; 69 N. E. 1085, 1088; 64 L. R. A. 260, 264; 102 Am. St. Rep. 341 (1904) (see § 34), where coercion by means of enforcement of a by-law providing for the imposition of a fine was held illegal. *Bowen v. Matheson* was distinguished as a case where, though "the

by-laws provided for a fine, the declaration did not charge that any coercion by means of a fine had been used."

In *Walsh v. Dwight*, 40 App. D. 513; 58 N. Y. Suppl. 91 (1899), there was held to be no liability on account of agreements with customers for a reduction of price in consideration of their agreeing not to sell for less than a fixed price. In *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611; 40 S. E. 591; 56 L. R. A. 804; 88 Am. St. Rep. 895 (1902), a corporation engaged in the business of transporting and storing oil was held to have no cause of action against a large producer of oil (the *Standard Oil Company*) because of the latter providing independent means of transportation (a pipe line), thus diverting business from the plaintiff, or because of it requiring other producers to ship through such line as a condition of dealing with them. But for instances of means employed by the *Standard Co.* to injure a competitor, and held to be illegal, see *Standard Oil Co. v. Doyle*,

free use of these laws. . . . But from the very nature of the case it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this

right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction or molestation."

line must run, and beyond which the party charged with trespass shall not be allowed to go." Much must depend on the character of the particular business. What is a natural incident or outgrowth of a wholesale business operating throughout a country, or even the world, might not be a necessary incident or outgrowth of a retail business confined in its operations to a small country. So, as between the business of transportation by railroad or otherwise, and the business of manufacturing.

§ 32. **Malicious intent.**—In the view already taken, malice or malicious intent, that is, malice in fact, as distinguished from malice in law, should be entirely ignored as a test of the legality of an injury by a trade competitor, though there is observable a tendency to apply such test. Ordinarily such injury, though done with intent to injure another, is also done with intent to benefit one's self. It may not be easy to conceive

118 Ky. 662; 82 S. W. 271; 111 Am. St. Rep. 331 (1904). So as to systematic course of interference with the business of peddling, in *Evenson v. Spaulding*, 150 Fed. 517; 82 C. C. A. 263; 9 L. R. A. N. S. 904 (9th C., 1907); affirming *Spaulding v. Evenson*, 149 Fed. 913 (C. C. Wash., 1906).

See, generally, as to liability for injury to trade competitor, *Gilly v. Hirsh*, 122 La. —; 48 So. 422 (1909); *Schwanbeck v. Backus*, 148 Mich. 508; 111 N. W. 1046 (1907); *Cobbey v. State Journal Co.*, 77 Neb. 626; 113 N. W. 224 (1907); *Kellogg v. Lehigh Valley R. R. Co.*, 61 App. D. 35; 70 N. Y. Suppl. 237 (1901); *Kuhn v. Woolson Spice Co.*, 10 Ohio S. & C. P. Dec. 292, 300 (*Lucas Com. Pl.*, 1897); *Brown v. American Freehold Land Mortgage Co.*, 97 Tex. 599; 80 S. W. 985; 67 L. R. A. 195 (1904). As to libel, see *Burr's Damascus Tool Works v. Peninsular Tool Manuf. Co.*, 142 Mich. 417; 105 N. W. 858 (1905). As to acts of owner of patents, *Far-*

quhar Co. v. National Harrow Co., 102 Fed. 714; 42 C. C. A. 600; 49 L. R. A. 755 (3d C., 1900).

See, on the general subject, articles in 43 Cent. Law Jour. 302 (1896) by W. H. Tuttle; 15 Harv. Law Rev. 427 (1901-2) by Bruce Wyman; editorial note in 18 Law Quart. Rev. 1 (1902).

The following are instances of statutory prohibition of acts injuring a trade competitor, particularly, discrimination by sale in one locality at a lower rate than in another: Ark. L. 1907, c. 298; Iowa, L. 1906, c. 169; Kan. G. S. (*Dassler's ed.*, 1905), §§ 4475 et seq.; La. L. 1908, c. 128; Minn. L. 1907, c. 269; Mo. L. 1907, p. 334; Neb. L. 1907, c. 157 (see also under § 222); N. C. L. 1907, c. 218; N. D. L. 1907, cc. 258, 260; S. D. L. 1907, c. 131; Tenn. L. 1907, c. 36 (see c. 360). See also under Okla. (§ 228). In *State v. Drayton*, 117 N. W. 768 (*Supm. Ct. Neb.*, 1908), was sustained Neb. L. 1907, c. 157.

of such an injury that is not only the natural incident or outgrowth of the relation of trade competitor, but also done purely with intent to injure another, that is without intent to benefit one's self,⁸ though we submit that such an injury is entirely lawful.

§ 33. **Inducing refusal to deal.**—In the view already taken, there is nothing illegal in merely inducing refusal to deal.⁹ But it has been seen that some special relation is generally regarded as necessary for the purpose of justifying such inducing, at any rate when the act of inducing is that of a combination as distinguished from a mere individual, and committed with malice.¹⁰ The relation of trade competitor has frequently been regarded as sufficient for this purpose.¹¹

⁸ The question as to the effect of such an act was raised by Hannen, J., in *Mogul S. S. Co. v. McGregor* (see § 31), but it was regarded as unnecessary to decide it, the intent of the defendants to benefit themselves being clear. See *Vege-lahn v. Guntner*, 167 Mass. 92, 106; 44 N. E. 1077, 1081; 35 L. R. A. 722, 726; 57 Am. St. Rep. 443 (1896); under § 34, *State ex rel. Durner v. Huegin*, 110 Wis. 189, 250; 85 N. W. 1046, 1062; 62 L. R. A. 700, 741 (1901). In *Tuttle v. Buck*, 119 N. W. 946 (Supm. Ct. Minn., 1909), it was held actionable to start an opposition place of business, not for the sake of profit to one's self, but regardless of loss, and for the sole purpose of driving a competitor out of business.

⁹ See § 19.

¹⁰ See § 20.

¹¹ Very suggestive is the following statement in the dissenting opinion of Holmes, J., in *Vege-lahn v. Guntner*, 167 Mass. 92, 106; 44 N. E. 1077, 1081; 35 L. R. A. 722, 726; 57 Am. St. Rep. 443 (1896), with reference to the limits of lawful

interference with the business of a trade rival: "We all agree, I presume, that it may be done by persuasion to leave a rival's shop and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants."

In *Lewis v. Huie-Hodge Lumber Co.*, 121 La. 658; 46 So. 685 (1908), a corporation engaged in the manufacture of lumber, but also operating a "general mercantile store," was held not liable in an action by the proprietor of another such store in the same locality, for inducing its employees to refuse to deal with the plaintiff; so of threats to drummers that it would not deal with the houses that they represented, if they sold to the plaintiff. There

§ 34. **Boycott by trade competitor.**—In the view already taken there is nothing illegal in a boycott apart from acts of violence or acts producing fear of violence. *A fortiori* is this the case if the boycott is merely the natural incident or outgrowth of some lawful relation. But it has also been seen that there has rather extensively prevailed the doctrine that a boycott is inherently illegal, even apart from violence.¹² In this view a boycott is not justified even by the circumstance of it being the natural incident or outgrowth of the relation of trade competitor. Hence have resulted two hardly reconcilable classes of decisions; one sustaining,¹³ and the other de-

was said to be "no pretence in this case that the defendant company entered into any combination with others to injure the plaintiff." Here was distinguished *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 214; 16 So. 806; 27 L. R. A. 416; 49 Am. St. Rep. 366 (1895; see § 41), as a case of a railway official exerting the power of his official position over the employees of his employer for his own private advantage. *Webb v. Drake*, 52 La. Ann. 290; 26 So. 791 (1899; see §§ 20, 25), was thus distinguished: "The defendants in that case were not acting singly, each controlling his own conduct; but they had joined together in order to destroy plaintiff's business. That business was one which did not enter into competition with that of any of the defendants, but was entirely distinct from it."

In *London Guarantee & Accident Co. v. Horn*, 206 Ill. 493; 69 N. E. 526; 99 Am. St. Rep. 185 (1904), the relation of trade competitor was held not to exist for the purpose of justifying inducing discharge from employment. See § 71.

See, on the general subject, arti-

cle in 15 Harv. Law Rev. 427 (1901-2) by Bruce Wyman.

¹² See c. V.

¹³ In the well-considered case of *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223; 55 N. W. 1119; 21 L. R. A. 337; 40 Am. St. Rep. 319 (1893), was involved the legality of an agreement contained in the by-laws of an association composed of from twenty-five to fifty per cent. of the retail lumber dealers in Iowa, Minnesota, Nebraska and the Dakotas, not to deal with any wholesale dealer or manufacturer selling directly to customers, not dealers, at a point where a member of the association might be doing business, such agreement providing for notice being given to all the members whenever a wholesale dealer or manufacturer made such sale. An application by a wholesale manufacturer and dealer in lumber for an injunction against issuing such notice, and from stating or mailing any matter that might injure its trade or business, and from combining with others to hinder or limit its sales and transactions, was refused.

In *Ertz v. Produce Exchange*, 79 Minn. 140; 81 N. W. 737; 48 L.

nying¹⁴ the legality of a boycott as an incident or outgrowth of such relation, the latter view being sustained by the weight of authority. There has been manifested a disposition to distinguish between a combination merely to refuse to deal, and one

R. A. 90; 79 Am. St. Rep. 433 (1900), it was held to be an actionable injury to carry into effect a combination between a "produce exchange company" and its members, who constituted practically all the persons engaged in buying and selling farm produce in the city of Minneapolis. The combination was not only for the purpose of refusing to buy of or sell to the plaintiff, who was a commission merchant in Minneapolis, buying and selling farm produce, but of *inducing* other persons *not parties to the combination* to so refuse. See subsequent decision in 82 Minn. 173; 84 N. W. 743; 51 L. R. A. 825; 83 Am. St. Rep. 419 (1901). Bohn Manuf. Co. v. Hollis, *supra*, was distinguished

on the ground that there was "no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage" from the wholesale dealer. In short, the distinction is between *refusing to deal*, and *inducing others to refuse to deal*. The occasion of the defendants' action was the refusal of the plaintiff, who was a member of the "produce exchange company" to pay a fine imposed for selling produce contrary to the by-laws, whereupon he was suspended from membership. In Gray v. Building Trades Council, 91 Minn. 171, 181; 97 N. W. 663, 666; 63 L. R. A. 753, 758; 103 Am. St. Rep. 477 (1903), in allowing an injunction to employers

¹⁴ In Jackson v. Stanfield, 137 Ind. 592, 607; 36 N. E. 345, 350; 23 L. R. A. 588, 594 (1894), an agreement contained in the constitution of an association of about one hundred and fifty retail lumber dealers provided thus, as stated by the court: "The regular dealer, when his territory is encroached upon by a wholesale dealer or manufacturer, is authorized to notify the person so offending that he has a claim against him for such sale or shipment, and to make a demand therefor. If the parties cannot adjust it, it is made the duty of the member to notify the secretary of the facts in the case, who shall refer the matter to the executive committee, whose duty it is to

hear the grievances and determine the claim. If the wholesaler or manufacturer ignores the decision of the committee, it is the duty of the secretary to notify the members of the association of the name of the person so offending, and of the members to no longer patronize him. If they continue to deal with the offender, they shall be expelled from the association, and if any member refuses to abide by the decision of the executive committee, his name is to be stricken from the membership of the society. The facts found by the court disclose that the appellees, as members of the combination complained of, availed themselves of the means provided for in § 3, to destroy the business

to induce others to refuse to deal, the latter, though it would seem not necessarily the former, being regarded as illegal. So again there has been manifested a disposition to hold a combination merely to refuse to deal illegal, if there be present the

against a boycott instituted for the purpose of compelling the employment of union labor only (see § 62) *Bohn Manuf. Co. v. Hollis* was distinguished as involving action that "was in effect a strike and not restrainable in equity," there being "no claim made of any boycott."

Bohn Manuf. Co. v. Hollis was followed in *Macauley v. Tierney*, 19 R. I. 255; 33 Atl. 1; 37 L. R. A. 455; 61 Am. St. Rep. 770 (1895), sustaining an agreement by an association of master plumbers not to deal with dealers in plumbing materials selling to other than master plumbers, in a suit by plumbers, not members of the association, to restrain the performance of acts under the agreement.

In *Brown v. Jacobs Pharmacy*

Co., 115 Ga. 429, 449; 41 S. E. 553, 562; 57 L. R. A. 547, 557; 90 Am. St. Rep. 126 (1902), it was said of *Bohn Manuf. Co. v. Hollis* and *Macauley v. Tierney*, that they can be sustained "only on the idea that the defendants were seeking to obtain trade for themselves by saying in effect: 'If you deal with us, we will deal with you. If you deal with others, we will withdraw our patronage.' . . . There was no effort to compel or coerce others not members to be bound by their prices or views." Of *Bohn Manuf. Co. v. Hollis*, it was also said: "No compulsory measures seem to have been used to enforce obedience on members; nor does there appear to have been any effort to drive away from plaintiff others than those volun-

of the appellants (plaintiffs) as brokers in lumber, because they were not retail dealers within the definition of the term, and that they effectuated their purpose. The special findings of fact clearly show it to be a compact to suppress the competition of those dealers who did not own yards with an adequate stock on hand, by driving them out of business. By this plan they reach the wholesale dealer and compel him to pay an arbitrary penalty, under a threat of financial injury, and they force him to assist in ruining the dealer who does not own a yard." An action for an injunction and for damages as for conspiracy, was sustained by a broker who had purchased from a whole-

sale dealer against whom the association enforced the penalty, and which, fearing a repetition thereof, refused to again deal with the plaintiff. For existing statutory provisions in Indiana, see p. 80, *infra*. A boycott under similar conditions was held actionable in *Cleland v. Anderson*, 66 Neb. 252; 92 N. W. 306; 5 L. R. A. N. S. 136 (1902), under the Nebraska anti-trust act. See also *State v. Adams Lumber Co.*, 116 N. W. 302 (Supm. Ct. Neb., 1908); also § 222.

In *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 620; 40 S. E. 591, 595; 56 L. R. A. 804, 809; 88 Am. St. Rep. 895 (1902), *Jackson v. Stanfield* was distinguished as "not a case where own-

element of coercion exerted by the combination upon the members thereof, thus by the enforcement of a by-law imposing a penalty upon a member refusing to join in the combination. Both these distinctions seem to us to be unwarranted, the latter, per-

sonally acting in concert, and no pressure on outsiders to maintain fines or incur ruin. In truth, however, some of what was said in that decision is unsound."

In *Martell v. White*, 185 Mass. 255, 263; 69 N. E. 1085, 1088; 64 L. R. A. 260, 264; 102 Am. St. Rep. 341 (1904) (see *infra*) *Bohn Manuf. Co. v. Hollis* was distinguished as a case of absence of "coercion by means of fines upon those who traded with the plaintiff," it being said that "there was among the rules of the association a clause requiring the plaintiff to pay ten per cent., but the propriety or the legality of that provision was not involved."

In *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64; 71 S. W. 691

(1902), *Bohn Manuf. Co. v. Hollis* and *Macauley v. Tierney* were said to be "not supported by the great weight of authority." See also, criticism of *Bohn Manuf. Co. v. Hollis*, in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 920; 28 C. C. A. 99, 107 (8th C., 1897).

In the following decisions, under varying conditions, the propriety of a boycott by a trade competitor seems to have been more or less clearly recognized.

In *Park v. National Wholesale Druggists' Assoc.*, 54 App. D. 223; 66 N. Y. Suppl. 615 (1900); affirmed in 175 N. Y. 1; 67 N. E. 136; 62 L. R. A. 632; 96 Am. St. Rep. 578 (1903), an agreement had been entered into between a number of manufacturers of proprietary

ers of property and business as here seek to further their interests by inducing others to trade with them and not with competitors. There it was a pure agreement to compel others not to deal with a party a boycott not, as in this instance, to compel persons to deal with the defendants."

The following seem properly classed as decisions that, generally speaking, deny the validity of a boycott by a trade competitor:

In *State ex rel. Durner v. Huegin*, 110 Wis. 189, 250; 85 N. W. 1046, 1062; 62 L. R. A. 700, 741 (1901), the combination held unlawful was among proprietors of three newspapers to refuse the privilege of advertising to those adver-

tising in a fourth newspaper at certain rates. The object of the combination, as stated in the opinion, was to compel such newspaper to reduce its advertising rates, but it is also stated therein that it did not appear that "the agreement contemplated that any legitimate benefit under any circumstances would flow to the participants therein or the concerns they represented, by compelling the J. company to reduce its rates." The provisions of Wis. Stat. (1898), § 4466a were here said to be "a mere declaration of the common law." This decision was followed as *res judicata* in *Aikens v. State*, 113 Wis. 419; 89 N. W. 1135 (1902); affirmed as *Aikens v. Wisconsin*, 195 U. S. 194; 25 Supm.

haps, especially so, as it involves taking into consideration the purely internal management of an association, for the purpose of determining the rights of one not a member thereof. These questions have usually arisen in connection with the operations

drugs and medicines and of wholesale dealers therein, representing two-thirds of the business in such articles in the United States. By such agreement the manufacturers were to sell to such dealers at fixed and uniform prices, and the latter were not to sell to retail dealers or others at less than "the proprietors' list prices." Refusal in accordance with such agreement to sell to a wholesale dealer who refused to conform to the provisions of such agreement was held to produce him no actionable injury. Compare prior proceeding in 50 N. Y. Suppl. 1064 (Supm. Ct., Sp. T., 1896); also in 30 App. D. 508; 52 N. Y. Suppl. 475 (1898); also in *Park v. Hubbard*, 30 App. D. 517; 52 N. Y. Suppl. 481 (1898). See comments

in *Brown v. Jacobs Pharmacy Co.*, supra. In *Straus v. American Publishers' Assoc.*, 177 N. Y. 473; 69 N. E. 1107; 64 L. R. A. 701; 101 Am. St. Rep. 819 (1904), however, an action was held to lie on account of action of dealers in *uncopyrighted* books, under conditions that seem closely similar to those under consideration in *Park v. National Wholesale Druggists' Assoc.* The distinction seems to rest on the distinction between *copyrighted* books (regarded as analogous to the proprietary drugs and medicines) and *uncopyrighted* books. The agreement in question was regarded as in violation of the New York anti-trust act, but see § 224. Subsequent decisions in 92 App. D. 350; 86 N. Y. Suppl. 1091 (1904); 193 N. Y.

3; 49 L. Ed. 154 (1904; see § 7 as to objections to constitutionality of § 4466a).

In *Hawarden v. Youghioghney & L. Coal Co.*, 111 Wis. 545; 87 N. W. 472; 55 L. R. A. 828 (1901), an agreement by which wholesale coal dealers owning practically all the coal docks at Superior and Duluth were to sell to certain retail dealers and none others, for the purpose of forcing out of the retail trade all other dealers, was held illegal in an action by a retail dealer not so included.

In *Boutwell v. Marr*, 71 Vt. 1; 42 Atl. 607; 43 L. R. A. 803; 76 Am. St. Rep. 746 (1899), where, however, the existence of the relation of trade competitor does not dis-

tinctly appear, was held illegal the action of an association of granite manufacturers in resolving not to deal with non-members, followed by the action of individual members in withdrawing their patronage from the plaintiff, who was engaged in the business of polishing granite. A like situation was presented in *Martell v. White*, 185 Mass. 255; 69 N. E. 1085; 64 L. R. A. 260; 102 Am. St. Rep. 341 (1904), where was held maintainable an action against members of an association of dealers (in granite) for causing a refusal of such members to deal with the plaintiff (a non-member, dealing in granite), by means of the enforcement of a by-law providing for the imposition of a heavy

of those who, by virtue of their numbers or the extent of their operations, or both, control business throughout a wide area, and within such limits, at least, are able to drive from the field of competition the person against whom the boycott is directed.

496; 86 N. E. 525 (1908). See also *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 168 (C. C. N. Y., 1905), involving the same state of facts. In *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906), where the conditions were similar to those involved in *Park v. National Wholesale Druggists' Assoc.*, the refusal to sell was held actionable, it appearing that there existed "a combination to exact and maintain a maximum schedule of prices for drugs and druggists' supplies between the defendants and others in restraint of trade," and the refusal to sell being regarded as part of a scheme in restraint of trade.

In *Ward v. South Dakota Retail*

Merchants', etc., Assoc., 150 Fed. 413 (C. C. S. D., 1907), was denied relief against the action of retail dealers in not only agreeing not to purchase from wholesalers and jobbers who sold to catalogue or mail order houses, but in requesting the wholesalers and jobbers not to sell to such houses.

In *Collins v. American News Co.*, 34 Misc. 260; 69 N. Y. Suppl. 638; affirmed in 68 App. D. 639; 74 N. Y. Suppl. 1123 (1902), it was held not actionable for a combination of newspaper publishers to induce a news company (through which as a "distributing contractor," newspapers were sold by publishers to dealers) to refuse to supply papers to such a dealer, unless he should desist from distributing hand bills

fine upon members dealing with non-members. This was regarded as coercion by actual or threatened injury to property.

In *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429; 41 S. E. 553; 57 L. R. A. 547; 90 Am. St. Rep. 126 (1902), was under consideration an association composed of about three-fourths of the druggists in Atlanta. The secretary and treasurer of a corporation engaged in the drug business was a member of such association. Such corporation having either by its methods of advertising or otherwise given offense to the members of the association, the secretary and treasurer withdrew from the association after charges had been preferred against him.

An injunction was allowed against carrying into effect the following scheme adopted by the association for the purpose of preventing the corporation from buying goods: By circulars, letters or otherwise, wholesalers and manufacturers throughout the country were notified that such corporation was "an aggressive cutter," and requested not to sell it any more goods; furthermore all salesmen representing such wholesalers and manufacturers were required to procure from the association a card, in order to procure which such salesmen were obliged to sign an agreement not to sell to such corporation; furthermore such wholesalers and manufacturers were given to understand

Sometimes the inducement is of refusal to *buy*, sometimes of refusal to *sell*; but it does not appear that, as between these classes of cases, there is any difference as to the rule of liability applicable.

and circulars with papers distributed by him. It appeared (or rather, it seems to have been assumed by the court) that the object of such publishers was "not to injure" such dealer, but "to protect themselves by preventing him from making such use of their publications as should make him a competitor with them in the business of advertising."

In *Master Builders' Assoc. v. Domascio*, 16 Colo. App. 25; 63 Pac. 782 (1901), the circumstance that a number of builders and contractors, members of an association, notified a person about to construct a building that they declined to bid thereon if the bid of a certain builder, not a member of the association, were received in competition, was

held not to constitute a cause of action in favor of the latter.

In *Scottish Co-operative Wholesale Society v. Glasgow Fleshers' Assoc.*, 35 Scottish Law Rep. 645 (1898), there being competition in the sale of meat between certain co-operative stores and butchers, it was held not actionable for an association of such butchers to induce certain cattle salesmen to refuse to sell to the co-operative stores. The means employed were an intimation on the part of the butchers that they would not deal with such salesmen unless they refused to sell to the co-operative stores. The court regarded the case as controlled by *Mogul S. S. Co. v. McGregor* (see § 131).

that unless they refused to sell to such corporation, the members of such association would not buy from them. This decision was applied in *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509; 50 S. E. 353; 69 L. R. A. 90; 106 Am. St. Rep. 137 (1905), in allowing to a corporation engaged in the business of printing in Atlanta, an injunction against a number of persons, also there engaged in that business, and who had entered into a combination embracing nearly the entire printing and publishing fraternity of that place except the newspapers, and with the object of "creating a monopoly and stifling competition in the printing business," that is, by fixing and controlling the price of printing. The

acts enjoined were committed because of the refusal of the plaintiff to affiliate with the combination, and included influencing labor organizations to obstruct the business of the plaintiff. The means employed included inducing plaintiff's employees to break their contracts of employment, thus by inducing labor organizations to call out their members from the plaintiff's shop, under the threat that upon their refusal to do so the defendants would run their respective businesses under what is known as an open shop; that is, they would employ their labor without reference to their connection with the various unions.

See also *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St.

§ 35. **Inducing breach of contract.**—In determining the legality of the act of inducing another to break his contract, there has already been indicated as a test applicable, whether such

Rep. 399 (1906); *Straus v. American Publishers' Assoc.*, 177 N. Y. 473; 69 N. E. 1107; 64 L. R. A. 701; 101 Am. St. Rep. 819 (1904); *Locker v. American Tobacco Co.*, 121 App. D. 443; 106 N. Y. Suppl. 115 (1907).

In *Olive v. Van Patten*, 7 Tex. Civ. App. 630; 25 S. W. 428 (1894), the decision in *Delz v. Winfree*, 80 Tex. 400; 16 S. W. 111; 26 Am. St. Rep. 755 (1891), was followed in sustaining an action by a lumber dealer against an association of such, it being alleged that, because of his refusal to join such association, they maliciously distributed circulars asking that patronage be withdrawn from him until he agreed not to sell to others than dealers, thereby influencing others not to deal with him.

To the same class of decisions seems referable *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 3 Misc. 582; 24 N. Y. Suppl. 647 (Supm. Ct., Sp. T., 1893). Compare *People v. Duke*, 19 Misc. 292 (N. Y. Co. Gen. Sess., 1897).

In *Bailey v. Master Plumbers*, 103 Tenn. 99; 52 N. W. 853; 46 L. R. A. 561 (1899), were disapproved, as creating an illegal restriction upon competition, by-laws similar in effect to the agreement under consideration in *Macauley v. Tierney*, supra, though the point was not directly involved. In *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280; 71 S. W. 455 (1902), a plumber was held to have a cause of action against an association of

plumbers, and against a number of dealers in plumbers' supplies, composing all those engaged in selling and manufacturing such supplies in St. Louis, because of carrying into effect an agreement by which such dealers were not to sell to any plumber without his first becoming a member of such association.

In *Purington v. Hinchliff*, 219 Ill. 159; 76 N. E. 47; 2 L. R. A. N. S. 824; 109 Am. St. Rep. 523 (1905); affirming 120 Ill. App. 523 (1905), was sustained an action by a manufacturer of bricks against an association of such manufacturers and an association of those engaged in constructing brick and mason work, and purchasing and obtaining supplies of brick, for carrying into effect an agreement by which brick was to be purchased only from members of the association of manufacturers.

In *Master Builders' Assoc. v. Domascio*, 16 Colo. App. 25, 32; 63 Pac. 782, 785 (1901), it was said that the decisions here discussed "all expressly turn upon the fact that there was coercion, intimidation, or malicious threats to do an unlawful injury."

As to the necessity of showing that injury has actually resulted from a boycott by a trade competitor, see *Downes v. Bennett*, 63 Kan. 653; 66 Pac. 623; 55 L. R. A. 560; 88 Am. St. Rep. 256 (1901), where the enforcement by an association of traders of a by-law providing that such association would not recognize any yard trader not a member of such association, was held to

act was the natural incident or outgrowth of some lawful relation. The decisions seem not in harmony as to whether the relation of trade competitor is sufficient for that purpose.¹⁵

furnish no right of action to yard traders not such members. This on the ground that such traders had not a sufficient interest in the subject matter of the controversy, it not appearing that the members of the association would trade with the plaintiffs, even if such by-law were abrogated. The court said: "How can they (the plaintiffs) prove that among the hundreds of dealers on the market and the hundreds of daily transactions they have among themselves, an appreciable share of the denied trade would fall to them?"

By Ind. Stat. (Burns' Ed., 1908), §§ 3884 et seq., is imposed civil and criminal liability for making any contract, etc., "to induce, procure or prevent any wholesale or retail dealer in or manufacturer of merchandise, or of supplies or of material or article intended for trade or used by any mechanic, artisan or dealer in the prosecution of his business, from selling such supplies to any dealer or to any mechanic or artisan"; so upon any such dealer or manufacturer who shall be a party to such contract, etc., or shall upon the request of a party thereto refuse to sell to one requiring them in the prosecution of his business, for the reason that he is not a member of a combination or association.

Some of the anti-trust acts contain prohibitions against boycotts of trade competitors. It would appear that sometimes the inclusion of such prohibitions is based on a lack of comprehension of the funda-

mental distinction between combinations producing private and those producing public injury. See Ind. Stat. (Burns' Ed., 1908), §§ 3889-92 (see § 210); Mo. R. S. (1906), § 8978 (see § 220); S. C. L. 1902, c. 574 (see § 229); Tex. L. 1899, c. 146 (see § 232). In Nebraska (see § 222) the definition of a trust includes a combination to fix prices "with the intent to prevent others from conducting or carrying on the same business or selling or trafficking in the same article, use or merchandise."

¹⁵ It seems to have been regarded as sufficient, in *Chambers v. Baldwin*, 91 Ky. 121; 15 S. W. 57; 11 L. R. A. 545; 34 Am. St. Rep. 165 (1891), where a trade competitor caused the breach of a contract to sell goods, with the design of himself becoming purchaser, and the decision is in part at least expressly based on the ground that the act was in the course of trade competition. The court said (91 Ky. 130; 15 S. W. 59; 11 L. R. A. 550; 34 Am. St. Rep. 170): "If the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered." So in *Bourlier v. Macauley*, 91 Ky. 135; 15 S. W. 60; 11 L. R. A. 550; 34 Am. St. Rep. 171 (1891), it was held proper for a rival theatrical manager to induce an actress to break her engagement at another

theater for the purpose of performing at his own. Compare *Lumley v. Gye*, *infra*. On the same ground is perhaps to be sustained *McCann v. Wolff*, 28 Mo. App. 447 (1888), where the action was held not maintainable, on the ground that there was neither malice nor fraud. Here the defendant, claiming a commission on a sale of real estate, carried out his threat to break up the sale unless the plaintiff paid him such commission, thus depriving the plaintiff, a real-estate broker who had negotiated the sale, of his commission. It would seem that, according to some authorities, this was a *malicious* act, though malice was not in terms charged. In *Lumley v. Gye*, 2 El. & Bl. 216 (1853), the act of inducement was by a competitor in trade, though no attention was paid by the court to that circumstance. So in *Brown Hardware Co. v. Indiana Stove Works*, 96 Tex. 453; 73 S. W. 800 (1903); reversing 69 S. W. 805 (Tex. Civ. App., 1902).

But the relation of trade competitor was held insufficient for such purpose, in *Beekman v. Marsters*, 195 Mass. 205; 80 N. E. 817; 11 L. R. A. N. S. 201; 122 Am. St. Rep. 232 (1907). See also *Reynolds v. Davis*, 198 Mass. 294; 84 N. E. 457; 17 L. R. A. N. S. 162 (1908). So in *Doremus v. Hennessy*, 176 Ill. 608; 52 N. E. 924; 43 L. R. A. 797; 68 Am. St. Rep. 203 (1898), where was sustained an action by one engaged in the laundry business for inducing breach of contracts to do laundry work for her. The acts held unlawful were not those of a mere individual, but of an association of laundrymen, the occasion of such action being the refusal of the plaintiff to increase her prices in ac-

cordance with the scale fixed by the association. In some instances, at least, the breaking of the contracts was induced by "threats" of destruction of business. In *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556; 69 Atl. 405; 16 L. R. A. N. S. 746 (1908), it was held insufficient, it being declared "not lawful, in order to procure the benefit for himself, for one to wrongfully force a party to an existing contract to break it," and a threat "to do an act which would seriously cripple, if not ruin, such party, unless he does break it," was said to be "equivalent to force, as that term is used in this connection." Here was sustained an action for inducing breach by the seller of a contract of sale, such inducing being by a manufacturer from whom the seller purchased, the motive being to induce the buyer to purchase directly from the manufacturer. For the purpose of inducing such breach, the manufacturer threatened to refuse to supply the seller, unless it violated such contract. It was, however, intimated that it would have been otherwise had the manufacturer had the right to compel the seller to break his contract, thus, that if the contract between the manufacturer and the seller prohibited the latter from selling to any customer of the former, and the buyer in question was a customer within the meaning of the contract, it would not necessarily have been wrongful for the manufacturer to refuse to supply the seller for such buyer.

In *Gatzow v. Buening*, 106 Wis. 1; 81 N. W. 1003; 49 L. R. A. 475; 80 Am. St. Rep. 17 (1900), the decision was based on the seemingly erroneous assumption that any

civil liability results from the existence of a mere restriction upon competition. See § 164. But the real question was whether the existence of the relation of trade competitor justified the action of members of a liverymen's association in seeking to enforce a by-law directed against dealings with liverymen not members of the association. As a result of such action a member violated his agreement to furnish vehicles at a funeral, and under circumstances that made it impossible to obtain others. In other words, the question was whether the

act of breach of contract or of inducing a breach of contract was justifiable as a natural incident or outgrowth of the relation of the members of the association as trade competitors of liverymen hiring for less than association prices. This, the real question, was overlooked and consequently not decided.

As to inducing such breach by fraud, see *National Phonograph Co. v. Edison-Bell Co.*, 1 Ch. D. (1908) 335.

See, on the general subject, article in 15 *Harv. Law Rev.* 427 (1901-2) by Bruce Wyman.

CHAPTER VIII

RELATION OF EMPLOYER AS JUSTIFYING INJURY

- § 36. Relation of employer as justifying injury.
- 37. Right to refuse to employ or to discharge from employment.
- 38. Inducing refusal to employ or to discharge from employment.
- 39. Statutory restrictions (and constitutionality thereof) upon right to refuse to employ, or to discharge from employment, e. g., on account of membership in labor union.
- 40. Legality of methods of inducing to enter employment.
- 41. Malicious intent.
- 42. Lockouts.
- 43. Blacklisting.
- 44. Boycott by employer.

§ 36. **Relation of employer as justifying injury.**—The frequent controversies between “capital” and “labor” forcibly remind us how fruitful the relation between employer and employee is of opportunities for the commission of acts injuring another. But, notwithstanding all the confusion that has been produced by the introduction of the doctrines allowing effect to malice or malicious intent and “combination,” we find no obstacle to the application to these relations of the same test as before. The doctrine applied now is that *the existence of the relation to another as employer or employee justifies acts that are the natural incident or outgrowth of such relation, whether or not done with the direct intent to injure the employee or employer (as the case may be).*¹ Reserving for detailed consideration

¹ That the same test is applicable to the relation of employer as to that of trade competitor, see § 45.

As to combinations among employers, see *City Trust, etc., Co. v. Waldhauer*, 47 Misc. 7; 95 N. Y. Suppl. 222 (Supm. Ct., Tr. T., 1905); *Sackett & Wilhelms Litho-*

graphing, etc., Co. v. National Assoc. of Employing Lithographers, 61 Misc. 150; 113 N. Y. Suppl. 110 (Supm. Ct., Sp. T., 1908).

Though it is the generally accepted doctrine that it is illegal to induce one to quit his employment, yet in *Walker v. Cronin*, 107 Mass.

hereafter the more numerous complications involved in the relation of employee, we here confine ourselves to a consideration of that of employer.

§ 37. **Right to refuse to employ or to discharge from employment.**—It has already been seen that there is nothing inherently or necessarily illegal in refusing to deal or to continue to deal with another. It is merely a special application of such rule to say that there is nothing inherently or necessarily illegal in refusing to employ or refusing to continue to employ, in other words, to discharge from employment.² Nor, generally speak-

555, 563 (1871), it was intimated that the inducement is not unlawful if merely in the course of the exercise of the right to employ workmen in one's own business.

As to unconstitutionality of statute denying benefits of employment agency to employer, whose employees are on strike or locked out, see *Mathews v. People*, 202 Ill. 389; 67 N. E. 28; 63 L. R. A. 73; 95 Am. St. Rep. 241 (1903).

In most of the States provision has been made by statute for the arbitration of disputes between employer and employee; so by act of Congress of June 1, 1898 (30 Stat. L. 424), applicable to carriers engaged in interstate commerce.

For instances of arbitration under State legislation, see *Renaud v. State Court of Mediation*, 124 Mich. 648; 83 N. W. 620; 51 L. R. A. 458; 83 Am. St. Rep. 346 (1900); *Pingree v. State Court of Mediation*, 130 Mich. 229; 89 N. W. 943 (1902); *New Orleans City & Lake R. R. Co. v. State Board of Arbitration*, 47 La. Ann. 874; 17 So. 418 (1895). See as to acts of Congress, *Atchison, T. & S. F. Ry. Co. v. Gee*, 139 Fed. 582 (C. C. Iowa, 1905). As to power of board of arbitration to punish for contempt

under Missouri statute, see *State ex rel. Haughey v. Ryan*, 182 Mo. 349; 81 S. W. 435 (1904).

See, generally, article in 41 Am. Law Rev. 197 (1907) by F. W. Gunnell. For a review of British legislation on the subject, see article in 24 Law Mag. & Rev. (1899-1900) by Edward Fry.

² *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49; 46 Atl. 208 (1899); *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 761; 53 Atl. 230, 231 (1902); *Union Pacific R. Co. v. Ruef*, 120 Fed. 102, 113 (C. C. Neb., 1902); *Mills v. U. S. Printing Co.*, 99 App. D. 605, 615; 91 N. Y. Suppl. 185, 192 (1904). So held in case of discharge without notice because of membership in labor union. *Boyer v. Western Union Tel. Co.*, 124 Fed. 246 (C. C. Mo., 1903). In *Payne v. Western & Atlantic R. R. Co.*, 13 Lea (Tenn.), 507, 521; 49 Am. Rep. 666, 674 (1884), an action by a merchant against a railroad company, for notifying its employees that it would discharge them if they traded with the plaintiff, was held not to lie, notwithstanding allegations of threats and intimidation.

In *Brown v. Jacobs Pharmacy*

ing, is the employer bound to assign a reason for the discharge.³ And where the relation between an employer and an employee is contractual, the former clearly has the right to enforce the contract or to terminate it according to its terms.

§ 38. **Inducing refusal to employ or to discharge from employment.**—The question of liability for inducing refusal to employ or inducing to discharge from employment has frequently arisen in cases, elsewhere considered, where the act of inducing is that of an employee.⁴ But in its more general aspects the question has, at least until recently, been but little discussed, and it seems to have been said, not without reason: "The common law courts have not had time to speak distinctly on this subject as yet, and it is necessary to be cautious in dealing with a subject

Co., 115 Ga. 429, 450; 41 S. E. 553, 562; 57 L. R. A. 547, 557; 90 Am. St. Rep. 126 (1902), it was said of *Payne v. Western & Atlantic R. Co.*, that "there was no question of combination or conspiracy at all." But that employers have the right to combine to refuse employment, see *Atkins v. Fletcher Co.*, 65 N. J. Eq. 658; 55 Atl. 1074 (1903); N. Y., *Chicago & St. Louis R. R. Co. v. Schaffer*, 65 Ohio St. 414; 62 N. E. 1036; 62 L. R. A. 931; 87 Am. St. Rep. 628 (1902).

As to what amounts to actionable threat to discharge from employment, see *Chiatovich v. Hanchett*, 96 Fed. 681 (C. C. Nev., 1899). And see, as to effect of malicious intent, § 41.

As to criminal liability for extorting money by threat to discharge, see *Matter of McCabe*, 29 Mont. 28; 73 Pac. 1106 (1903).

There are several instances of statutory provisions to the effect that in case of obligation resting upon an employee to give notice of intention to quit his employment, under penalty of forfeiture of part

of his wages, there shall rest upon the employer a like obligation to give notice of intention to discharge, under penalty of a like forfeiture. See *Me. R. S.* (1903), c. 40, § 51; *Mass. R. L.* (1902), c. 106, § 10; *N. J. G. S.* (1895), p. 2351, § 77; *L.* 1904, c. 64, § 27; *Pa.* 2 P. & L. Dig., p. 4802; *R. I. Gen. Laws* (1896), c. 198, § 25; *Wis. L.* 1899, c. 330, § 1. See 1 *Tiedeman's State & Federal Control of Persons & Property*, § 104.

³ See *Illinois Central R. R. Co. v. Ely*, 83 Miss. 519; 35 So. 873 (1904); but as to right of railroad employee to demand such reason, see *Ohio R. S.* (Bates' Ed., 1906), § 3365 (—20), and statutory provisions discussed in 1 *Tiedeman's State and Federal Control of Persons and Property*, § 104. And for general requirement that a corporation employer furnish a written statement of the cause of quitting service, see *Mo. R. S.* (1906), § 1006 (1); *Okla. L.* 1907, c. 53, art. 3.

⁴ See c. IX.

in which both courts of law and courts of equity as yet are feeling their way.”⁵ Obviously, inducing refusal to employ or inducing to discharge from employment is merely a special form of inducing refusal to deal, or to continue to deal, and what has already been stated seems applicable here, namely, that, according to the authorities generally, it seems regarded as necessary that there exist some special relation by way of justification, “at any rate, when the act of inducing is that of a combination as distinguished from a mere individual, and committed with malice, that is, malice in fact.”⁶ The conditions under which such relation will be regarded as sufficient seem as yet but very imperfectly determined.⁷

⁵ *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 768; 53 Atl. 230, 234 (1902). Here, where the right of action of an intended employer for inducing to refuse to enter employment was regarded as based on what is here termed a “probable expectancy” (see § 66), it was suggested that the right of action of one seeking employment, for inducing to refuse to employ him, is based on the same ground. See also *Atkins v. Fletcher*, 65 N. J. Eq. 658; 55 Atl. 1074 (1903); *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 118; 85 N. E. 897, 901 (1908). Compare as to liability for acts of violence as incident to boycott or refusal to deal, § 74.

⁶ See § 20. As to blacklisting, see § 43.

⁷ In *Holder v. Manuf. Co.*, 135 N. C. 392; 47 S. E. 481 (1904), an employer who had discharged an employee was held liable for procuring the discharge of the latter by a subsequent employer, it being said that the conduct of the employee, at the time of his discharge by the former employer, was “not such that (such employer) could

use with a subsequent employer to effect the discharge of the plaintiff.” In this view the liability would turn on the relations between the employee and the former employer.

In *Joyce v. Great Northern Ry. Co.*, 100 Minn. 225; 110 N. W. 975; 8 L. R. A. N. S. 756 (1907), was sustained an action against a railroad corporation for preventing from obtaining re-employment with a depot company of which the railroad corporation was a tenant. Here was sustained and applied a statute making it unlawful “for any two or more employers or any two or more corporations, to combine or to agree to combine or confer together for the purpose of interfering with, or preventing any person or persons from procuring employment.” “Malice” was held essential to the right of action under the statute, it being here defined as “an unlawful act, done intentionally, without just cause or excuse.” But such just cause or excuse was held not furnished by the circumstance that the motive of the railroad corporation was to induce or coerce the applicant for employ-

§ 39. Statutory restrictions (and constitutionality thereof) upon right to refuse to employ, or to discharge from employment, e. g., on account of membership in labor union.—The constitutional guaranty of liberty undoubtedly includes liberty to refuse to deal or to continue to deal, hence to refuse to employ, or to discharge from employment. It follows that any statute attempting to restrict such constitutional right is unconstitutional, thus statutes attempting to deny the right to refuse to employ, or to discharge from employment, on the ground of membership in a labor organization.⁸ It has been said on this point:

ment into releasing it from claim for damages for personal injury. See, however, as to what would have been effect of such claim appearing to be without merit.

As to one officer of a corporation inducing another to discharge employee, see *Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432; 83 Pac. 131; 3 L. R. A. N. S. 696; 114 Am. St. Rep. 171 (1905).

For other instances, see under — 43 as to blacklisting.

⁸ For instance, act of Congress of June 1, 1898 (30 Stat. L. 428, § 10), declaring it unlawful to "require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization," or to "threaten any employee with loss of employment," or to "unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization." For similar provisions, see Cal. Penal Code, § 679; Colo. R. S. (1908), §§ 3925, 3926 (labor organization or political party); Conn. G. S. (1902), § 1297; Idaho Rev. Codes (1908), § 1456; Ill. R. S.

(Starr & Curtis' ed., 1896), p. 1315; Ind. Stat. (Burns' ed., 1908), § 2683; Kan. G. S. (Dassler's ed., 1905), §§ 4039, 4040; Mass. R. L. 1902, c. 106, § 12; *Berry v. Donovan*, 188 Mass. 353, 360; 74 N. E. 603, 606; 5 L. R. A. N. S. 899, 905; 108 Am. St. Rep. 499 (1905); Minn. R. L. (1905), § 5097; Mo. R. S. (1906), §§ 2156-8; Nev. L. 1903, c. 111; N. J. G. S. (1895), p. 1905, §§ 45, 46; N. Y. Penal Code, § 171a; Ohio R. S. (Bates' Ed., 1906), § 4364 (—68); Okla. L. 1907, c. 53, art. 2, § 1; Oreg. L. 1903, p. 137 ("labor or other lawful organization"); Pa. 3 P. & L. Dig., p. 252; Wis. Stat. (1898), § 4466b; L. 1899, c. 332.

By Minn. R. L. (1905), § 1823, it is a crime to "require as a condition precedent to employment, any written statement as to the participation of the applicant in a strike or as to his personal record, save as to his conviction of a public offense, for more than one year immediately preceding the date of his application therefor.

By N. Y. Penal Code, § 171b (added by L. 1903, c. 349), it is a crime to deprive a member of the national guard of his employment, or prevent his being employed by himself or another because of such

"It is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept

membership. To like effect, Wis. L. 1907, c. 462.

For illustrations of legislation directed against "coercing" an employee to deal or not to deal with particular persons, see Fla. R. S. (1906), §§ 3233-4; Ind. Stat. (Burns' Ed., 1908), §§ 8004-5; Ky. Stat. (1903), § 2739A; *Commonwealth v. Reinecke Coal Mining Co.*, 117 Ky. 885; 79 S. W. 287 (1904); Mont. Rev. Codes (1907), § 8472; Nev. L. 1903, c. 124; Ohio R. S. (Bates' Ed., 1906), § 7016; Oreg. L. 1907, c. 192; Tenn. Code (1896), §§ 6879-86; Tex. L. 1903, c. 63; Utah Comp. Laws (1907), § 4487x 25. For prohibitions against requiring employees to contribute for particular purposes, see Ind. Stat. (Burns' Ed., 1908), § 2681; Mich. Comp. Laws (1897), §§ 11400-3; Ohio R. S. (Bates' Ed., 1906), § 3365 (—20); act of Congress of June 1, 1898 (30 Stat. L. 428, § 10, relating to carriers engaged in interstate commerce); against requiring release from liability for negligence, Mont. Const., art. 15, § 16; Rev. Codes (1907), §§ 5053, 8676; Ohio R. S. (Bates' Ed., 1906), §§ 3365 (—20); Wyom. Const., art. 19; R. S. (1899), § 2522; act of Congress of June 1, 1898, *supra*. Compare Mass. L., 1908, c. 489.

For illustrations of legislation directed against coercing an employee

to vote in a particular way, see Ariz. Penal Code, §§ 42, 43; Fla. R. S. (1906), §§ 3839-40; Idaho Rev. Codes (1908), § 6372; Ind. Stat. (Burns' Ed., 1908), § 2578; Ky. Stat. (1903), §§ 1574A3; Mass. R. L. (1902), c. 11, § 414; Mich. Comp. Laws (1897), § 11452; Nev. L. 1903, c. 106; N. J. L. 1906, c. 206; Oreg. Codes, etc. (1901), §§ 1905-6; S. D. Penal Code, §§ 62, 83; Tenn. Code (1896), §§ 6884-6; Wis. L. 1899, c. 330. See also La. R. S. (Wolff's Ed., 1904), § 902. So of coercing not to accept nomination for office, Wyom. R. S. (1899), § 2523.

By Minn. R. L. (1905), § 5173, is forbidden requiring employees to surrender "any natural right or any right or privilege of citizenship."

As to discharge solely on account of age, see Colo. R. S. (1908), § 3927.

By Miss. Const., § 191, "the legislature shall provide for the protection of the employees of all corporations doing business in this State, from interference with their social, civil or political rights by said corporations, their agents or employees." See Code (1906), § 905.

As to discharge because of being obliged to serve as juror, see 36 Am. Law Rev. 596 (1902).

such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”⁹

§ 40. **Legality of methods of inducing to enter employment.**—As compared with the legality of methods of inducing to leave

⁹ *Adair v. U. S.*, 208 U. S. 161, 174; 28 Supm. 277, 280; 52 L. Ed. 436 (1908), where was held invalid § 10 of the act of Congress of June 1, 1898 (30 Stat. L. 428), supra. So in *Gillespie v. People*, 188 Ill. 176, 185; 58 N. E. 1007, 1010; 52 L. R. A. 283, 286; 80 Am. St. Rep. 176 (1900), as to Ill. R. S. (Starr & Curtis’ Ed., 1896), p. 1315, supra, a case of employment by the day only. So in *Coffeyville Vitrified Brick, etc., Co. v. Perry*, 69 Kan. 297; 76 Pac. 848; 66 L. R. A. 185 (1904), as to Kan. G. S. (Dassler’s Ed., 1905), §§ 4039–40, supra. So in *State v. Julow*, 129 Mo. 163; 31 S. W. 781, 29 L. R. A. 257; 50 Am. St. Rep. 443 (1895), as to Mo. R. S. (1906), §§ 2156–8, supra. So in *Goldfield Consol. Mines Co. v. Goldfield Miners’ Union*, 159 Fed. 500, 513 (C. C. Nev., 1908), as to Nev. L. 1903, c. 111, supra. So in *People v. Marcus*, 185 N. Y. 257; 77 N. E. 1073; 7 L. R. A. N. S. 282; 113 Am. St. Rep. 902 (1906); affirming 110 App. D. 255; 97 N. Y. Suppl. 322 (1905; see as to whether such legislation could be made to apply to corporations, in view of reserved power to amend and alter laws applicable thereto) of N. Y. Penal Code, § 171a, supra.

So in *State v. Bateman*, 7 Ohio N. P. 487 (Lucas Com. Pl., 1900), of Ohio R. S. (Bates’ Ed., 1906), § 4364 (—68), supra. So in *State ex rel. v. Kreutzberg*, 114 Wis. 530; 90 N. W. 1098; 58 L. R. A. 748; 91 Am. St. Rep. 934 (1902), as to Wis. Stat. (1898), § 4466b, supra.

See to the contrary, *Davis v. State*, 30 Weekly Law Bul. 342 (Hamilton Co., Ohio Com. Pl., 1893).

The question was left open in *State v. Darlington*, 153 Ind. 1; 53 N. E. 925 (1899), where an indictment under Ind. Stat. (Burns’ Ed., 1908), § 2683, supra, in the language of the statute was held defective for failure to show in what respect the employee was coerced.

As to whether such legislation is not unconstitutional as class legislation, see *State v. Julow*; *State v. Kreutzberg*, supra.

In *Order of R. R. Telegraphers v. Louisville & N. R. Co.*, 148 Fed. 437 (C. C. Ky., 1906), the act of Congress of June 1, 1898, § 10 (30 Stat. L. 428, relating to carriers engaged in interstate commerce), was held unconstitutional as not authorized by the commerce clause, it being also held that even on the supposition of its constitutionality, re-

or refrain from entering employment, the legality of methods of inducing to enter employment has been but little discussed. Of course, forcible or violent methods are clearly illegal. And doubtless a civil liability would result from the use of fraud or deception in inducing one to enter employment. Out of the exigencies produced by extensive strikes has resulted legislation creating (or declaring) civil or criminal liability or both, for such fraud or deception.¹⁰

§ 41. **Malicious intent.**—In the view already taken, malice or malicious intent should, as in case of a trade competitor, be entirely ignored as a test of the legality of an injury by an employer, though there is observable a tendency to apply such test.¹¹

lied thereunder by injunction was not allowable on the application of a corporation not within the description of "any employee or any person seeking employment."

See discussion of *Adair v. U. S.*, supra, in article in 42 Am. Law Rev. 161 (1908) by Richard Olney.

¹⁰ It is misrepresentation as to the existence or non-existence of a strike or other trouble between employer and employees, that is commonly aimed at by such legislation, but misrepresentation as to other conditions of employment, thus compensation or sanitary conditions is sometimes specified. See Cal. L. 1903, c. 229; Mont. Rev. Codes (1907), §§ 8469-71; Okla. L. 1907, c. 53, art. 21, § 3; Oreg. L. 1903, p. 193; Tenn. L. 1901, c. 104.

¹¹ In *Heywood v. Tillson*, 75 Me. 225, 237; 46 Am. Rep. 373, 381 (1883), the refusal of an employer to employ or retain in his service any person renting specified premises, was held to give no right of action to the owner of such premises, though such refusal was through malice or ill-will to such owner. See also *Jersey City Print-*

ing Co. v. Cassidy, 63 N. J. Eq. 759, 761; 53 Atl. 230, 231 (1902).

To the contrary, however, is *International & G. N. Ry. Co. v. Greenwood*, 2 Tex. Civ. App. 76; 21 S. W. 559 (1893), where an action was sustained against an employer for discharging employees because of their patronage of the plaintiff. The court said: "The employees presumably had the right to eat and drink where they chose, so long as they violated no contract with their employer, and performed their service well; and the malicious use of such moral coercion upon them by the appellant for the purpose of injuring appellee was wrongful."

To the same effect, *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann. 214; 16 So. 806; 27 L. R. A. 416; 49 Am. St. Rep. 366 (1895; see § 33). So of inducing one's employees not to deal with the plaintiff, *Chiatovich v. Hanchett*, 88 Fed. 873 (C. C. Nev., 1898); 96 Fed. 681 (C. C. Nev., 1899). But in *Payne v. Western & Atlantic R. R. Co.*, 13 Lea (Tenn.), 507; 49 Am. Rep. 666 (1884), such an action was

§ 42. **Lockouts.**—A lockout has been defined as “a refusal on the part of an employer to furnish work to his employees in a body, intended as a means of coercion.”¹² In this view the only difference between a lockout and the ordinary case of refusal to continue to employ consists in the number of the employees involved. The right to refuse to continue to employ being clear, it would seem to follow that there is nothing necessarily at least illegal in a “lockout.”

§ 43. **Blacklisting.**—It has already been stated that inducing refusal to employ, or inducing to discharge from employment, is merely a special form of inducing refusal to deal, or to continue to deal.¹³ So, again, it would seem that blacklisting is properly to be regarded as merely a special form of inducing refusal to employ or inducing to discharge from employment. The term blacklisting, however, seems to have especial reference to the action of a *combination* of employers, rather than to

held not to lie, *Heywood v. Tillson*, supra, being followed. It was, however, in *International & G. N. Ry. Co. v. Greenwood*, supra, held otherwise of a *refusal to employ*.

In *Baker v. Metropolitan Life Ins. Co.*, 64 S. W. 913; 55 L. R. A. 271 (Ct. App. Ky., 1901), the right to discharge was sustained notwithstanding allegations of such discharge being in pursuance of a conspiracy between the employer and others.

¹² *Century Dictionary*. In *Mathews v. People*, 202 Ill. 389, 398; 67 N. E. 28, 31; 63 L. R. A. 73, 77; 95 Am. St. Rep. 241 (1903), it was defined as “the closing of a factory or workshop by an employer, usually in order to bring the workmen to satisfactory terms by a suspension of wages.” See *Iron Molders’ Union v. Allis-Chalmers Co.*, infra.

There is a *dictum* in *Sinsheimer v. United Garment Workers*, 77 Hun, 215; 28 N. Y. Suppl. 321

(1894), that the combination of employers there under consideration “had the right to lock out all operatives connected with the defendants’ association because of demands which they considered unjust, made by the defendants upon one of their number.”

Sinsheimer v. United Garment Workers was cited on this point in *City Trust, etc., Co. v. Waldhauer*, 47 Misc. 7; 95 N. Y. Suppl. 222 (Supm. Ct., Tr. T., 1905), in sustaining a lockout instituted for the purpose of obtaining agreement for settlement of differences with employees by arbitration. See *N. Y. Central Iron Works v. Brennan*, 105 N. Y. Suppl. 865 (Supm. Ct., Sp. T., 1907).

As to the right to lock out as “balanced against” the right to strike, see *Iron Molders’ Union v. Allis-Chalmers Co.*, 162 Fed. 45; C. C. A. (7th C., 1908).

¹³ See § 38.

the action of one acting singly. It has been said to have reference to the practice of one employer presenting to another the names of employees for the purpose of furnishing information concerning their standing as employees.¹⁴ But, as commonly understood, it involves more than this, in view of the definition of a blacklist as "a list of persons marked out for special avoidance, antagonism or enmity, on the part of those who prepare the list or those among whom it is intended to circulate," said to be "most usually resorted to by combined employers, who exchange lists of their employees who go on strikes, with the agreement that none of them will employ the workmen whose names are on the lists."¹⁵ We here assume, in accordance with what has already been stated, that it is necessary that there exist some special relation by way of justification of blacklisting, "at any rate, when the act of inducing is that of a combination as distinguished from a mere individual, and committed with malice, that is malice in fact."¹⁶ Now, however it may be as to an *existing* relation of employer and employee, it seems not so clear that, the relation having terminated (as is ordinarily the case in blacklisting), such *previously existing* relation necessarily at least constitutes a sufficient justification. There has been much diversity of opinion as to whether blacklisting is legal at all, or, if so, under what conditions.¹⁷ It seems to us a reasonable view

¹⁴ State ex rel. v. Justus, 85 Minn. 279; 88 N. W. 759; 56 L. R. A. 757; 89 Am. St. Rep. 550 (1902), where it was under consideration whether the word as used in the title of an act was suggestive of the subject matter of the act, which was the coercing and influencing of employees by their employers.

¹⁵ Cogley on Strikes and Lockouts, p. 293. The term is sometimes used in the sense of *boycotting*. See Quinn v. Leathem, App. Cas. (1901) 495, 518, 521, and note 18, *infra*.

See, on the general subject, article in 40 Am. Law Rev. 196 (1906) by J. W. Bryan.

¹⁶ See §§ 20, 38.

¹⁷ Blacklisting as defined *supra*, was held actionable in Mattison v. L. S. & M. S. Ry. Co., 3 Ohio Dec. 526 (Lucas Co. Com. Pl., 1895). And it seems to have been regarded as actionable in Hundley v. Louisville & Nashville R. R. Co., 105 Ky. 162; 48 S. W. 429; 63 L. R. A. 289; 88 Am. St. Rep. 298 (1898), though there the action was held not maintainable, for failure to show that the plaintiff had sought and been refused employment by reason of such blacklisting. For an instance of a verdict of over \$21,000, said to have

that it may find justification, at least in the case of flagrant misconduct of an employee, the interest common to a number of em-

been rendered for blacklisting, see *Ketcham v. Chicago & Northwestern Ry. Co.*, 33 Am. Law Rev. 563 (1899).

In *Blumenthal v. Shaw*, 77 Fed. 954; 23 C. C. A. 590 (3d C., 1897), was sustained an action against a former employer for preventing the plaintiff from obtaining employment elsewhere, and causing his dismissal from places where he had procured work. This was done by merely requesting that he be not employed, such requests being complied with in pursuance of an understanding among a number of such employers not to employ an apprentice belonging to another.

But in *Trimble v. Prudential Life Ins. Co.*, 64 S. W. 915 (Ct. App. Ky., 1901), blacklisting seems to have been held not actionable. Compare with *Baker v. Metropolitan Life Ins. Co.*, 64 S. W. 913; 55 L. R. A. 271 (Ct. App. Ky., 1901). So it was held not actionable in *Jenkinson v. Nield*, 8 Times L. R. 540 (1892), it not appearing that "the defendants were actuated by any other motive than self-interest." This on the ground that such action was within the limits of fair competition. See also, as to liability for blacklisting, *Bradley v. Pierson*, 148 Pa. St. 502; 24 Atl. 65 (1892).

In *McDonald v. Illinois Central R. R. Co.*, 187 Ill. 529; 58 N. E. 463 (1900), it was held not actionable for a number of railroad corporations to agree that any employee that had voluntarily quit the employ of any of such corporations during a certain strike (the

American Railway Union strike of 1894), should not be employed by another unless he could produce the "clearance" or "clearance card" in common use among railroad circles, and commonly called by railroad men a "clearance."

In *Boyer v. Western Union Tel. Co.*, 124 Fed. 246, 249 (C. C. Mo., 1903), it was held not unlawful for an employer, having discharged employees because of membership in a labor union, to keep a book showing that they were discharged for that reason, and to invite inspection thereof or give information of its contents. See also *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289; 80 N. W. 1128; 79 Am. St. Rep. 387 (1899).

Clearly the discharged employee has no right to demand a clearance paper or certificate of good character or the like. See *Illinois Central R. R. Co. v. Ely*, 83 Miss. 519; 35 So. 873 (1904). Compare as to duty imposed by custom to give a "clearance card," *Cleveland, C. C. & St. Louis Ry. Co. v. Jenkins*, 174 Ill. 398; 51 N. E. 811; 62 L. R. A. 922; 66 Am. St. Rep. 296 (1898); *Hundley v. Louisville & Nashville R. R. Co.*, supra; *N. Y., Chicago & St. Louis R. R. Co. v. Schaffer*, 65 Ohio St. 414; 62 N. E. 1036; 62 L. R. A. 931; 87 Am. St. Rep. 628 (1902).

In *Willis v. Muscogee Manuf. Co.*, 120 Ga. 597; 48 S. E. 177 (1904), was sustained and applied an agreement among a number of cotton manufacturers to require employees to give a certain number of days' notice before leaving employment, to

employers to protect themselves against undesirable employees being analogous to that common to a body of tradesmen to protect

report to each other violations of such rule, and not to employ any person thus reported. But an employee was held to have a right of action for a wrongful report.

As to liability for libeling former employee, also as to sufficiency of statement of cause of action for preventing him from obtaining employment or retaining it when secured, see *Wabash R. R. Co. v. Young*, 162 Ind. 102; 69 N. E. 1003; 4 L. R. A. N. S. 1091 (1904). See also, as to liability for libeling former employee, *Illinois Central R. R. Co. v. Ely*, 83 Miss. 519; 35 So. 873 (1904); *Sheftall v. Central of Georgia Ry. Co.*, 123 Ga. 589; 51 S. E. 646 (1905).

In *Bacon v. Michigan Central R. R. Co.*, 66 Mich. 166; 33 N. W. 181 (1887), a communication from a subordinate to a superior official of a railroad corporation, to the effect that an employee had been discharged for stealing, was held privileged, but held also that the question of good faith in making such communication should have been left to the jury. So in *Missouri Pacific Ry. Co. v. Richmond*, 73 Tex. 568; 11 S. W. 555; 4 L. R. A. 280; 15 Am. St. Rep. 794 (1889), was held privileged the publication, for its own use, by a railroad corporation having many thousand employees, of a "discharge list" containing statements of the causes of the discharge of employees, such alleged cause in the case under consideration being carelessness. To similar effect, *Hunt v. Great Northern Ry. Co.*, 2 Q. B. (1891) 189.

In *Missouri Pacific Ry. Co. v. Behee*, 2 Tex. Civ. App. 107; 21

S. W. 384 (1893), the situation was similar to that involved in *Missouri Pacific Ry. Co. v. Richmond*, but here there was held to be evidence of malice sufficient to create a liability for the publication.

In *Willner v. Silverman*, 71 Atl. 962 (Ct. App. Md., 1909), an employer was held liable to a discharged employee for writing a letter to an association of such employers, one of the rules of which was that an employee discharged by one member should be refused employment by all the others. Such letter contained a request that he be "refused employment in all association houses in which he may apply for a position." Such letter, which was circulated among the members of the association, was said by the court not to state the facts of the case with entire accuracy, and to furnish some evidence of malice on the part of the writer.

See, on the general subject, article in 42 Am. Law Reg. N. S. 802 (1903) by R. S. Holland.

As to injunction against blacklisting, see § 105.

The following are instances of statutes imposing civil or criminal liability (in some instances both) for blacklisting: Ala. Crim. Code (1907), §§ 6398-9; Ark. L., 1905, c. 214; Colo. R. S. (1908), §§ 396, 397, 401, 402; Conn. G. S. (1902), § 1298; Fla. R. S. (1906), § 2854; Ga. Penal Code (1895), §§ 128-134; Civil Code (1895), §§ 1873-8; Ill. R. S. (Starr & Curtis' Ed., 1896), c. 38, § 96; Ind. Stat. (Burns' Ed., 1908), §§ 8007-8 (and see § 8009); Iowa Code (1897), §§ 5027-8; Kan.

themselves against delinquent debtors, which, as we have seen, has been regarded as sufficient to sustain an agreement among the members of such a body ¹⁸ not to deal with such debtors.

G. S. (Dassler's Ed., 1905), §§ 4026-9; Minn. R. L. (1905), § 5097; Miss. L. 1908, c. 93 (applicable to telegraphers); Mo. R. S. (1906), § 2166; Mont. Rev. Codes (1907), §§ 1755-7 (see also § 8467); Nev. L. 1905, c. 150; N. D. Rev. Codes (1905), § 8773 (see also Const., § 212); Okla. Stat. (1903), §§ 2658-9; Oreg. L. 1903, p. 137; Tex. L. 1901, c. 99; L. 1907, c. 67; Utah Comp. Laws (1907), §§ 1340, 1341 (see Const., art. 12, § 19; art. 16, § 4); Va. Code (1904), § 3657c; Wash. L. 1899, c. 23; Wis. Stat. (1898), § 4466b; act of Congress of June 1, 1898 (30 Stat. L. 428, § 10, relating to carriers engaged in interstate commerce).

By Minn. R. L. (1905), § 1822, it is unlawful to "contrive or conspire to prevent any person from obtaining or holding any employment, or discharge, or procure or attempt to procure the discharge of, any person from employment, by reason of his having engaged in a strike."

By Colo. R. S. (1908), § 401, is excepted the case of a former employer or employee "imparting a fair and unbiased opinion of a workman's or employer's qualifications when solicited so to do, by a later or prospective employer of such workman, or employee." So by Nev. L. 1905, c. 150, *supra*, is excepted giving in writing on application from a discharged employee, or one desiring to employ him, a truthful statement of the reason for discharge, such statement not to be used as the cause of an action for libel.

In *Wabash R. R. Co. v. Young*, 162 Ind. 102; 69 N. E. 1003; 4 L. R. A. N. S. 1091 (1904) Ind. Stat. (Burns' Ed., 1908), § 8008, *supra*, was on constitutional grounds held inapplicable to an employee voluntarily leaving his employment.

By Tex. L. 1901, c. 99, § 4, *supra*, "he is guilty of blacklisting who places or causes to be placed, the name of any discharged employee, or any employee who has voluntarily left the service of any individual, firm, company or corporation on any book or list, or publishes it in any newspaper, periodical, letter or circular, with the intent to prevent said employees from securing employment of any kind with any other person, firm, corporation or company, either in a public or private capacity." See also § 7, for prohibitions against interference with employment.

In *State ex rel. v. Justus*, 85 Minn. 279; 88 N. W. 759; 56 L. R. A. 757; 89 Am. St. Rep. 550 (1902) Minn. L. 1895, c. 174 (now § 5097, *supra*), was sustained against the objection that the subject was not expressed in the title; that the act was class legislation; that the natural rights of employees were violated, the court saying: "It is the purpose of this law to protect employees in the enjoyment of those natural rights and privileges guaranteed them by the constitution, viz., the right to sell their labor and acquire property thereby."

¹⁸ Compare *Western Union Tel. Co. v. Pritchett*, 108 Ga. 411; 34 S.

§ 44. **Boycott by employer.**—Boycotts by employers are infrequent as compared with boycotts by employees or trade competitors. There seems no reason to think, however, that their legality is to be tested by rules essentially distinct from those already considered. It seems a reasonable view that, at least under certain conditions, a boycott by an employer is sustainable as a natural incident or outgrowth of the relation of employer.¹⁹

E. 216 (1899), where, though the act in question was called "black-listing," it seems rather referable to the class of cases considered in § 21, involving the action of a body of tradesmen in protecting themselves against delinquent debtors.

¹⁹ Thus, in *Cote v. Murphy*, 159 Pa. St. 420, 430; 28 Atl. 190, 193; 23 L. R. A. 135, 138; 39 Am. St. Rep. 686 (1894), an action by a dealer in building materials was held not to lie against an association of persons engaged in the business of contracting and building, for inducing dealers in building materials not to sell to the plaintiff. The ground of this action of the association was that the plaintiff had conceded the demands of workmen engaged in a general strike in the building trades. The court, considering it necessary to show the legality of the relation, after drawing a distinction between the rate of wages as fixed by the law of supply and demand in the absence of combination, and the rate as fixed by a combination of workmen, justified the defendants' acts on the ground thus stated: "The combination of the employers was not to interfere with the price of labor as deter-

mined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price as regulated by the supply." To similar effect is *Buchanan v. Kerr*, 159 Pa. St. 433; 28 Atl. 195 (1894).

On the other hand, in *Chiatovich v. Hanchett*, 88 Fed. 873 (C. C. Nev., 1898), it was held actionable to induce the defendants' employees to refuse to deal with the plaintiff, by means of a published notice stating that the plaintiff "entertained feelings of animosity" for the defendants, that "his actions had tended to interfere with their business," that "his expressed intentions were to hinder and embarrass them still further," that "his interests are so antagonistic to ours—his purpose is so manifestly hostile—that those who favor him cannot complain if we consider them as equally unfriendly to us." Otherwise what was the relation between the plaintiff and the defendant does not appear. Further decision to the same effect in 96 Fed. 681 (C. C. Nev., 1899). Affirmed as *Hanchett v. Chiatovich*, 101 Fed. 742; 41 C. C. A. 648 (9th C., 1900).

CHAPTER IX

RELATION OF EMPLOYEE AS JUSTIFYING INJURY

- § 45. Relation of employee as justifying injury.
46. Solidarity of interest as justifying injury by employee.
 47. Refusal to enter or continue in employment.
 48. Quitting employment in violation of contract relation.
 49. Malicious intent.
 50. Criminal liability for injury done in pursuance of combination.
 51. Civil liability for injury done in pursuance of combination.
 52. Labor (or trade) unions.
 53. Combinations to increase wages.
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 55. Definition of strike.
 56. Strike as excuse for nonperformance of contract.
 57. Strike whether illegal apart from acts of violence, or acts producing fear of violence.
 58. Sympathetic strike.
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 60. Strike whether illegal because of intent to procure discharge of employee.
 61. Inducing refusal to deal.
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 63. Solidarity of interest as justifying boycott; secondary boycott.
 64. Inducing breach of contract.
 65. Inducing to refuse to continue in employment, i. e., to quit employment.
 66. Inducing to refuse to enter or re-enter employment.
 67. Inducing to quit employment in violation of contract to serve.
 68. Relation of employee as justifying inducing to quit employment.
 69. Combination to induce to quit employment.
 70. Criminal liability for combination to induce to quit employment.
 71. Inducing discharge from employment.
 72. Relation of employee as justifying inducing discharge from employment.

§ 45. **Relation of employee as justifying injury.**—What has already been said with reference to the relation of employer as justifying injury to another, may be applied to the relation of employee, so that, to repeat, the existence of the relation to an-

other as employee justifies acts that are the natural incident or outgrowth of such relation, whether or not done with the direct intent to injure the employer. That is to say, the same test is applicable to the relations of employer and employee as to that of trade competitor. "The contest between them is only competition on a wide basis."¹ It would seem, however, that the courts generally have hardly as yet advanced to that position.²

¹ *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 100, 125; 85 N. E. 897, 904 (1908). As to distinction between "the general relation of employer and employee," and such relation pending a strike or lockout, see *Iron Molders' Union v. Allis-Chalmers Co.*, *infra*.

² This seems, however, to have been clearly understood by Holmes, J., who, in his dissenting opinion in *Vegeahn v. Guntner*, 167 Mass. 92, 107; 44 N. E. 1077, 1081; 35 L. R. A. 722, 727; 57 Am. St. Rep. 443 (1896), said: "I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests." So in *Allen v. Flood*, App. Cas. (1898), 1, where the court, admitting, for the sake of argument, that the doctrine is confined to mere "acts which are done in furtherance of trade competition," applied it to inducing the discharge of fellow-employees, saying (p. 141): "Why is not the present case within it? What was

the object of the defendant and the workmen he represented but to assist themselves in their competition with the shipwrights? A man is entitled to take steps to compete to the best advantage in the employment of his labor, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a shipowner." So it was said by Lord Shand (p. 164): "The case was one of competition in labor, which in my opinion is in all essentials analogous to competition in trade, and to which the same principles must apply." See also p. 167; *Mills v. U. S. Printing Co.*, 99 App. D. 605, 611; 91 N. Y. Suppl. 185, 189 (1904); *Pickett v. Walsh*, 192 Mass. 572, 583; 78 N. E. 753, 758; 6 L. R. A. N. S. 1067, 1078; 116 Am. St. Rep. 272 (1906); *Parkinson v. Building Trades Council*, 98 Pac. 1027, 1038 (Supm. Ct. Cal., 1908); *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A., 7th C., 1908); dissenting opinion of Caldwell, J., in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 396; 28 C. C. A. 99, 123 (8th C., 1897).

Rich in suggestion is the article in 19 Law Quart. Rev. 37, 182 (1903) by D. R. Chalmers Hunt. See also articles in 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen; 20

In a dual sense an employee may be regarded as a competitor; that is, with other employees as well as with his employer.³ It will be seen hereafter that there is considerable diversity of opin-

Id. 253, 345, 428 (1907) by Jeremiah Smith.

On the other hand, in *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 124; 30 Atl. 881, 889 (1894), where an injunction was allowed against a boycott of a newspaper by a number of labor unions, affiliated in a society or representative body known as the "Essex Trades Council" (the members of only one of which had any grievance against the complainant, the action of the others being sympathetic), against the objection that the Council was a business institution, and that what it had done had been in prosecution of its business, the court, after expressly distinguishing *Mogul S. S. Co. v. McGregor* (see § 31) as a case of competition between parties engaged in the *same character of business*, said: "Neither does the claim of the Essex Trades Council that it is a business institution stand on any firmer ground. The only element of business which it is engaged in, would appear from the facts to be the furnishing to tradesmen of printed cards certifying that they are proper persons for the members of trades unions to deal with, suitable to be displayed in conspicuous places in such tradesmen's places of business. This was supplemented by the issue, under date of March 31, 1894, of the small pocket pamphlet entitled 'The Fair List of Newark, N. J.,' containing the names and addresses of tradesmen and persons in business in Newark, with items

of information and advice. Why this is called a business does not appear. It is not stated that any compensation is either required or received by the trades council from the trades people for granting or continuing those indorsements; but whether this is so or not, it is in no sense a competing business with the publication of a daily newspaper."

Similarly in *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*, 66 Atl. 953 (Ct. Ch. N. J., 1907), in allowing relief against picketing conducted in furtherance of strike instituted for purpose of compelling employment of union labor only, was disallowed the claim that those engaged in picketing were "competitors of the complainant in the labor market, and, being such, had the right to take from it all laborers that they can persuade to leave it, or refrain from entering its employ." To like effect, *Barnes v. Typographical Union*, 232 Ill. 424, 431; 83 N. E. 940, 943; 14 L. R. A. N. S. 1018, 1021 (1908).

In nearly every State statutory provision is made for the arbitration of disputes between employer and employee. For decisions thereunder, see § 36.

³ Such distinction was noted in *Berry v. Donovan*, 188 Mass. 353; 74 N. E. 603; 5 L. R. A. N. S. 899; 108 Am. St. Rep. 499 (1905), where procuring the discharge of an employee because of his refusal to become a member of a trade union was held unjustifiable in either view.

ion as to when acts are the natural incident or outgrowth of the relation of employee, thus notably when a strike or a boycott with intent to procure the discharge of an employee is justified as the natural incident or outgrowth of such relation.

§ 46. **Solidarity of interest as justifying injury by employee.**—Conceding, however, that the relation of employee justifies an injury done by him to his immediate employer, how far does it justify one done, not to such employer, but to an employer of those having what we may call “solidarity of interest” with him, thus, where they are engaged in the same general occupation or are members of the same organization. For instance, the employees in an iron mill engage in a dispute with their employer, and lawfully, as we here assume, employ the boycott as a weapon. Is it likewise lawful for other members of a union, say of all employees in iron mills throughout the country, to intervene in this particular dispute and boycott this particular employer, though, apart from their relation as members of this union, having no dispute with this employer or any other employer? Thus far it would seem that the judicial mind has not risen to the point of regarding this solidarity of interest as sufficient to justify an injury by an employee.⁴ It would seem, however, that the subject deserves a fuller examination before the law on this subject is allowed to be settled in the lines thus

⁴ That, however, there is a tendency in that direction appears from *Allen v. Flood*, App. Cas. (1898) 1, where the court said (p. 132): “The object which the defendant and those whom he represented had in view throughout was what they believed to be *the interest of the class to which they belonged*; the step taken was a means to that end.” See also p. 163.

See also, as to the solidarity of interest of employees, the vigorous argument of Caldwell, J., dissenting in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 935; 28 C. C. A. 99, 122 (8th C., 1897).

See as to sympathetic strikes, § 58.

There may have been a failure to sufficiently recognize the doctrine of solidarity of interest in *Reinecke Coal Mining Co. v. Wood*, 112 Fed. 477 (C. C. Ky., 1901), where though acts or threatened acts of violence seem a sufficient ground for the relief granted, the court seem to have been somewhat influenced by the circumstance that such were acts of members of a labor organization, who, for the purpose of maintaining their own wages according to a certain scale, sought by the acts thus held illegal, to compel certain em-

far tentatively established, especially as in somewhat analogous cases solidarity of interest has been recognized as constituting such a sufficient basis.⁵

§ 47. **Refusal to enter or continue in employment.**—Of course, it hardly needs stating that as a rule there is nothing illegal in refusing to enter the employment of another. And the right of a single individual, apart from contractual relations,⁶ to quit his employment, that is, to discontinue working for a particular employer, seems never to have been seriously questioned.⁷ Whether this right to quit equally exists in case of a *combination* to so quit will hereafter be considered.

ployees employed *in a distant region and by other employers* to join such organization and thereafter to strike for wages according to such scale. In *Foster v. Retail Clerks' Protective Assoc.*, 39 Misc. 48, 55; 78 N. Y. Suppl. 860, 866 (Supm. Ct., Sp. T., 1902), where there was held to be nothing illegal in a mere boycott instituted because of the refusal of employers to conform to certain requirements as to wages and working hours, those instituting it were said not to have sufficient interest in the result to justify their act if it required justification, they being neither employees of such employer nor members of the same union with their employees (a "retail clerks'" union), though members of another (a "boot and shoe workers' union") and obviously "engaged in a different occupation."

In the English Trade Disputes Act of 1906, by which certain acts done "in contemplation or furtherance of a trade dispute," are not actionable, it is thus provided: "In this act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and

workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of *any person*, and the expression 'workmen' means all persons employed in trade or industry, *whether or not in the employment of the employer, with whom a trade dispute arises.*"

See on the general subject, article in 20 Harv. Law. Rev. 253, 345, 428 (1907) by Jeremiah Smith.

⁵ Thus, the interest of a number of tradesmen to protect themselves against delinquent debtors, and the interest of a number of employers in a contest with employees. See §§ 21, 43.

⁶ See § 48.

⁷ See *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 114; 30 Atl. 881, 885 (1894); *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 761; 53 Atl. 230, 231 (1902); *Clemmitt v. Watson*, 14 Ind. App. 38; 42 N. E. 367 (1895); *National Protective Assoc. v. Cumming*, 170 N. Y. 315, 320; 63 N. E. 369; 58 L. R. A. 135, 138; 88 Am. St. Rep. 648 (1902).

The provisions of Ill. R. S. (Starr

§ 48. **Quitting employment in violation of contract relation.**—Of course, the quitting of employment may be illegal as in violation of an express contract of employment for a specified period.⁸ Furthermore, the idea has been advanced that the na-

& Curtis' Ed., 1896), p. 3297, §§ 129, 130, against obstructing and impeding railroad business, are by § 131 not to be "construed to apply to cases of persons voluntarily quitting the employment of any railroad company, or such other corporation, firm or individual, whether by concert of action or otherwise, except as is provided in § 128" (as to which see § 48); Kan. G. S. (Dassler's Ed., 1905), §§ 2480-3, are the same as §§ 129-131, *supra*, respectively. To similar effect, Ky. Stat. (1903), c. 32, § 802; Miss. Code (1906), § 1345.

⁸ See *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 130; 38 Am. Dec. 346, 355 (1842); *Reynolds v. Davis*, 198 Mass. 294; 84 N. E. 457; 17 L. R. A. N. S. 162 (1908); *Eden v. Silberberg*, 89 App. D. 259; 85 N. Y. Suppl. 781 (1903). It was indeed said in *Delaware, L. & W. R. Co. v. Switchmen's Union*, 158 Fed. 541 (C. C. N. Y., 1907), to have been "held" that "workmen may strike or quit their employment *ad libitum* . . . singly or in concert, *even though it be in violation of their service contract*." But this seems to have been said with reference to the question of an injunction being a proper remedy in such case.

In *Arthur v. Oakes*, 63 Fed. 310, 317; 11 C. C. A. 209, 216; 25 L. R. A. 414, 424 (7th Cir., 1894), it was intimated that, in case of a breach by an employee of his contract of employment, he might be liable, "in some states of case, to

criminal prosecution for loss of life or limb by passengers or others, directly resulting from his abandoning his post at a time when care and watchfulness were required upon his part in the discharge of a duty he had undertaken to perform." Such liability has indeed, in some cases been declared by statute.

Thus, by N. Y. Penal Code, § 673, it is a crime to "wilfully and maliciously, either alone or in combination with others, break a contract of service or hiring, knowing, or having reasonable cause to believe, that the probable consequence of his so doing will be to endanger human life, or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury."

In *Adair v. U. S.*, 208 U. S. 161, 175; 28 Supm. 277, 281; 52 L. Ed. 436 (1908), it was regarded unnecessary to determine whether "in the case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party without sufficient or just excuse or notice to disregard the terms of such contract or to refuse to perform it."

In several instances it is made a crime for a railroad employee to abandon a locomotive engine elsewhere than at the regular destination. Thus in Ill. R. S. (Starr & Curtis' Ed., 1896), c. 114, § 128; Kan. G. S. (Dasslers' Ed., 1905), § 2480. So by Del. R. S. (1893), p. 928; N. J. L. 1903, c. 257, § 62; Pa. 2 P. & L. Dig., p. 3954. So by

ture of the employment may create an implied agreement not to quit, at least, without reasonable notice,⁹ but this exception to the doctrine remains to become generally established.

Conn. G. S. (1902), § 1293, to "unlawfully, maliciously and in violation of one's duty or contract, unnecessarily abandon any locomotive, car, or train of cars, or street railway car." To similar effect, Me. R. S. (1903), c. 124, §§ 6, 7.

By La. R. S. (Wolf's Ed., 1904), p. 993, it is a crime to "wilfully violate a contract of labor upon the faith of which money or goods have been advanced, and without first tendering to the person from whom said money or goods was obtained, the amount of money or value of the goods"; also to entice away a laborer under such contract.

To similar effect, S. C. Crim. Code (1902), § 357. See also, Ala. Crim. Code (1907), § 6845, and L. 1901, c. 483, which was held unconstitutional in the Peonage Cases, 123 Fed. 671, 684 (D. C. Ala., 1903); *Toney v. State*, 141 Ala. 120; 37 So. 332; 67 L. R. A. 286; 109 Am. St. Rep. 23 (1904). See Tiedeman's State & Federal Control of Persons & Property, § 104.

⁹ This doctrine was applied in *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746, 752; 19 L. R. A. 395, 399 (C. C. Ohio, 1893), where it was said of railroad employees (in this particular case, a locomotive engineer), after referring to their presumed knowledge of the duty of their employers, both under the Interstate Commerce Law and an order of the court, to receive and haul interstate freight: "An implied obligation was therefore assumed by the employees, upon accepting service un-

der such conditions, that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties. In ordinary conditions, as between employer and employee, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employee has it in his power to arbitrarily terminate the relations and abide the consequences. But these relative rights and powers may become quite different in the case of the employees of a great public corporation charged by the law with certain great trusts and duties to the public." See also *Arthur v. Oakes*, 63 Fed. 310, 318; 11 C. C. A. 209, 218; 25 L. R. A. 414, 426 (7th C., 1894).

As to statutes imposing obligation upon employer to give notice of intention to discharge in case of obligation resting upon employee to give notice of intention to quit employment, see § 37.

§ 49. **Malicious intent.**—In the view already taken malice or malicious intent, that is, malice in fact, as distinguished from malice in law, should, as in case of a trade competitor and of an employer, be entirely ignored as a test of the legality of an injury by an employee,¹⁰ though there is observable a tendency to apply such test, as will be seen in considering the cases of strikes, and of boycotts by employees.

§ 50. **Criminal liability for injury done in pursuance of combination.**—A conspiracy being, as already seen, merely “a combination of two or more persons by some concerted action, to accomplish *some criminal or lawful purpose* or to accomplish some purpose not in itself criminal or unlawful by *criminal or unlawful means*,” it follows that an injury done by an employee produces no criminal liability merely because of being done in pursuance of a combination to do such act, that is, of course, in the absence of employment of criminal or unlawful means. This is now the accepted doctrine, though not always formerly. Its application will be seen more fully in considering the cases of strikes and of boycotts by employees.

§ 51. **Civil liability for injury done in pursuance of combination.**—As with malice or malicious intent, so, in the view already taken, the element of combination should be entirely ignored as a test of civil liability for an act of an employee, thus, in case of a strike or boycott. As will be seen, however, in specially considering such cases, there is observable a tendency to apply such test.

§ 52. **Labor (or trade) unions.**—On principle, it is not apparent why the legality of combinations among employees as such, should be subjected to any different test from that applied to combinations among employers as such, or among tradesmen as such. Combinations among those having a common interest are numerous and cover an infinite variety of purposes; witness, churches, clubs, lodges and other organizations for religious, social and business purposes. “The right of laborers to organize

¹⁰ See *Pickett v. Walsh*, 192 6 L. R. A. N. S. 1067, 1080; 116 Mass. 572, 587; 78 N. E. 753, 759; Am. St. Rep. 272 (1906).

unions" is said to be "an exercise of the common law right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit," such right being, however, limited "by the existence of the same right in all other citizens."¹¹ As a rule, the legality of such combinations, when unincorporated, is conceded on common-law principles,¹² and at present much encouragement is furnished by statutes for their formation as corporations.¹³ A trade union has been defined as "a combination of workmen of the same trade or of several allied trades for the purpose of securing, by united action, the most favorable conditions as regards wages, hours of labor, etc., for its members."¹⁴ But however legal a labor (or trade) union may be as to its mere organization and existence, it is obviously subject

¹¹ *Pickett v. Walsh*, 192 Mass. 572, 580; 78 N. E. 753, 757; 6 L. R. A. N. S. 1067, 1077; 116 Am. St. Rep. 272 (1906). See *U. S. v. Moore*, 129 Fed. 630 (C. C. Ala., 1904).

¹² See *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 526; 77 N. W. 13, 24; 42 L. R. A. 407, 418; 74 Am. St. Rep. 421 (1898); *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Ind. 155, 171 (C. C. Wis., 1906).

As to agreements between labor unions and employers, see *Fell v. Berry*, 124 App. D. 336; 108 N. Y. Suppl. 669 (1908); *Barnes v. Berry*, 157 Fed. 883 (C. C. Ohio, 1908).

¹³ Thus special provision therefor is made by act of Congress of June 29, 1886 (24 Stat. L. 86); see act of June 1, 1898 (30 Stat. L. 424). See *Arthur v. Oakes*, 63 Fed. 310, 324; 11 C. C. A. 209, 223; 25 L. R. A. 414, 431 (7th C., 1894). So by La. R. S. (Wolff's Ed., 1904), p. 223; Md. Pub. Gen. Laws (1904), art. 23, § 41; see *Lucke v. Clothing Cutters', etc., Assembly*, 77 Md. 396; 26 Atl. 505;

19 L. R. A. 408; 39 Am. St. Rep. 421 (1893); by Mich. Comp. Laws (1897), pp. 2343, et seq.; N. J. G. S. (1895), p. 167; Pa. 2 P. & L. Dig., p. 2915 (see p. 2913); see *Flaccus v. Smith*, 199 Pa. St. 128; 48 Atl. 894; 54 L. R. A. 640; 85 Am. St. Rep. 779 (1901); by Tex. L. 1899, c. 153. See Colo. R. S. (1908), § 3924; Mass. R. L. (1902), c. 125, §§ 13-16. And doubtless in other instances, even when not expressly provided for, the incorporation of a labor union is authorized by the provisions of a general statute. As to English Trade Union Act of 1871, see *Chamberlain's Wharf v. Smith*, 2 Ch. (1900) 605.

As to granting relief to such corporation on account of injury to individual members, see *Master Horseshoers' Assoc. v. Quinlivan*, 83 App. D. 459; 82 N. Y. Suppl. 288 (1903).

¹⁴ *Century Dictionary*. Certain statutory provisions (see 2 P. & L. Dig., p. 2913) held not to justify inducing employees to violate their agreement with their employer not

to restrictions with reference to the employment of particular methods, thus for the purpose of increasing or retaining membership or enforcing regulations of the union. "The social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend or to accomplish injury to others."¹⁵ "The law allowing them to combine

to belong to a labor union. *Flaccus v. Smith*, supra. As to propriety of compelling by injunction or otherwise, continuance of association or membership in labor union, see *O'Brien v. Musical Protective Union*, 64 N. J. Eq. 525; 54 Atl. 150 (1903). As to when contract of employment is entered into with reference to rules of such union, see *Burnetta v. Marceline Coal Co.*, 180 Mo. 241; 79 S. W. 136 (1904). As to rule providing for allowance of "strike pay," see *Howden v. Yorkshire Miners' Assoc.*, 1 K. B. (1903) 308.

In most of the States statutory provision is made for the protection of labels, marks, etc., adopted by labor unions for the purpose of designating the products of the labor of the members thereof. For collation of such statutes, see Paul on Trade-marks, pp. 649 et seq. As to the effect of such labels independently of statute, see *Id.*, § 85.

Such statutes were held constitutional in *State v. Bishop*, 128 Mo. 373; 31 S. W. 9; 29 L. R. A. 200; 49 Am. St. Rep. 569 (1895); *Schmalz v. Woolley*, 57 N. J. Eq. 303; 41 Atl. 939; 43 L. R. A. 86; 73 Am. St. Rep. 637 (1898); *Perkins v. Heert*, 158 N. Y. 306; 53 N. E. 18; 43 L. R. A. 858; 70 Am. St. Rep. 483 (1899); *Commonwealth v. Morton*, 23 Pa. Co. 386 (1899); subsequent decision in 16 Pa. Super. 423 (1901); *Common-*

wealth v. Meads, 29 Pa. Super. 321 (1905). As to constitutionality of provision for fixing amount of penalty, see *Cigar Makers' Union v. Goldberg*, 72 N. J. Law, 214; 61 Atl. 457; 70 L. R. A. 156; 111 Am. St. Rep. 662 (1905). See also, as to such statutes, *Lawlor v. Merritt*, 79 Conn. 399; 65 Atl. 295 (1906); previous decision in 78 Conn. 630; 63 Atl. 639 (1906); *Comer v. State*, 103 Ga. 69; 29 S. E. 501 (1897); *Lynch v. John Single Paper Co.*, 115 App. D. 911; 101 N. Y. Suppl. 824 (1906). See also, article in 42 Am. Law Rev. 511 (1908) by W. A. Martin.

As to registration of insignia of such unions, see Mass. L. 1904, c. 335.

¹⁵ *Curran v. Galen*, 152 N. Y. 33; 46 N. E. 297; 37 L. R. A. 802; 57 Am. St. Rep. 496 (1897). Here the court also said: "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of employment, then that purpose seems clearly unlawful and mili-

for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the hurt of another.”¹⁶ We exclude here from consideration, as only tending to confuse our present discussion, an ele-

tates against the spirit of our government and the nature of our institutions.”

¹⁶ *Queen v. Rowlands*, 17 Q. B. 671, 686 (1851). This language was approved in *Curran v. Galen*, *supra*. In accordance with the view we have already advanced, we consider this statement open to criticism as making the “purpose” or *intent* the test of liability, instead of whether the act was the natural incident or outgrowth of the relation in which the party stood. The force of this criticism will be more apparent upon a consideration of the facts involved in *Curran v. Galen*. See discussion thereof, § 72. In *Longshore Printing Co. v. Howell*, 26 Oreg. 527, 540; 38 Pac. 547, 551; 28 L. R. A. 464, 472; 46 Am. St. Rep. 640 (1894), were thus stated the limitations upon the activities of such organizations: “These associations must depend for their membership upon the free and untrammelled choice of each individual member. No resort can be had to compulsory methods of any kind, either to increase, keep up or retain such membership. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules and regulations through violence, threats or intimidation, or to employ any methods that would induce intimidation or deprive persons of perfect freedom of action. Such organizations may be preserved and their membership augmented by reason-

ing and fair arguments, and even by persuasion and entreaty, and an observance of their adopted constitutions and by-laws may be exacted through the same peaceful means, but beyond this it is not advisable, from a legal standpoint, to venture.” See also *U. S. v. Cassidy*, 67 Fed. 698, 711 (D. C. Cal., 1895).

The above language in *Longshore Printing Co. v. Howell*, was quoted from in *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 121; 85 N. E. 897, 901 (1908), which see as to power to make by-laws and enforce obedience thereto; also as to when they interfere with the rights of third parties. See also, § 6.

As to interference by union with employment of one not a member, see *Levin v. Cosgrove*, 67 Atl. 1070 (Supm. Ct. N. J., 1907).

For application of term “scab,” see *Century Dictionary*; *Southern Ry. Co. v. Machinists’ Local Union*, 111 Fed. 49, 55 (C. C. Tenn., 1901); *L. D. Willcutt & Sons Co. v. Driscoll*, *supra*.

As to expulsion or suspension from membership, see *Schneider v. Local Union No. 60*, 116 La. 270; 40 So. 700; 5 L. R. A. N. S. 891; 114 Am. St. Rep. 549 (1906); *Harris v. Detroit Typographical Union*, 144 Mich. 422; 108 N. W. 362 (1906); *Corregan v. Hay*, 94 App. D. 71; 87 N. Y. Suppl. 956 (1904); *Fritz v. Knaub*, 124 App. D. 915; 108 N. Y. Suppl. 1133 (1908); affirming 57 Misc. 405; 103 N. Y.

ment that has to but a slight extent figured in the controversy, namely, the tendency of such combinations to destroy competition. This we shall consider hereafter in connection with combinations to increase prices.¹⁷ Generally speaking, a labor union, like other voluntary associations, is not liable to be sued,¹⁸ though such liability has sometimes been created by statute.

§ 53. **Combinations to increase wages.**—As has been seen,

Suppl. 1003 (1907); *Cotton Jamers, etc., Assoc. v. Taylor*, 23 Tex. Civ. App. 367; 56 S. W. 553 (1900). As to imposition of fine, see *Fuerst v. Musical Mut. Protective Union*, 95 N. Y. Suppl. 155 (N. Y. City Ct., Tr. T., 1905).

For prohibition against discrimination by labor union because of membership in national guard, see N. Y. Penal Code, § 171c, a provision apparently occasioned by the transactions on which the decision in *Potter v. Sheffer*, 40 Misc. 46; 81 N. Y. Suppl. 164 (Supm. Ct., Sp. T., 1903), was based.

As to when rules of labor union or similar association are illegal as in restraint of trade, see *Parker v. Toronto Musical Protective Assoc.*, 32 Ont. 305 (1900); *Cullen v. Elwin*, 88 L. T. R. 686 (1903); appeal dismissed in 90 L. T. R. 840 (1904).

¹⁷ See § 126. That a labor union may be illegal as in restriction upon competition, that is, as here described, "a trust pure and simple," see *Froelich v. Musicians' Mutual Benefit Assoc.*, 93 Mo. App. 383, 391 (1902), where, because of such illegality, relief was denied against expulsion from membership.

As to objection to legality of labor unions as "organized for the purpose of monopolizing to their members, the labor market in any particular trade," see *Brennan v.*

United Hatters of North America, 73 N. J. Law, 729, 739; 65 Atl. 165, 169; 9 L. R. A. N. S. 254, 259; 118 Am. St. Rep. 727 (1906). In *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997, 1003 (Supm. Ct. Mo., 1908), where relief was allowed against a boycott instituted to procure the exclusive employment of members of unions (see § 62), they were said not to be "unlawful combinations made and entered into in restraint of trade."

See articles in 19 Pol. Sci. Quart. 193 (1904) by Mabel Atkinson; 22 Id. 385, 611 (1907) by H. R. Seager.

¹⁸ *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 Fed. 598 (C. C. Ohio, 1898); *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*, 165 Ind. 421; 75 N. E. 877; 2 L. R. A. N. S. 788 (1905); *Plant v. Woods*, 176 Mass. 492, 504; 57 N. E. 1011, 1015; 51 L. R. A. 339, 344; 79 Am. St. Rep. 330 (1900). The rule was applied to a suit in equity, in *Pickett v. Walsh*, 192 Mass. 572, 589; 78 N. E. 753, 760; 6 L. R. A. N. S. 1067, 1081; 116 Am. St. Rep. 272 (1906); *Reynolds v. Davis*, 198 Mass. 294; 84 N. E. 457; 17 L. R. A. N. S. 162 (1908). But in *St. Paul Typothetæ v. St. Paul Bookbinders' Union*, 94 Minn. 351; 102 N. W. 725 (1905), where the rule was applied in an action at law, it was seeming-

there has existed a tendency at least to apply the element of combination as a test of liability for acts of employees. Such tendency has been manifested in the alleged doctrine that a mere combination to obtain an increase of wages is illegal as a

ly intimated that it might be otherwise as to an injunction.

See *Ehrlich v. Willenski*, 138 Fed. 425 (C. C. Pa., 1905); *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011 (C. C. Cal., 1905); *Krug Furniture Co. v. Berlin Union*, 5 Ont. Law Rep. 463 (1903).

In *Barnes v. Typographical Union*, 232 Ill. 402; 83 N. E. 932; 14 L. R. A. N. S. 1150; 122 Am. St. Rep. 129 (1908), the objection that the union could not be sued was held not available in a proceeding to punish for contempt for violation of an injunction. So on appeal, in *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A., 7th C., 1908). See previous decision in *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 182 (C. C. Wis., 1906).

As to application of rule enabling a few to be sued as representatives of a numerous class, see *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, *supra*; *Pickett v. Walsh*, *supra*; *Reynolds v. Davis*, *supra*; *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 110, 111; 85 N. E. 897, 898 (1908); *Iron Molders' Union v. Allis-Chalmers Co.*, *supra*. As to Nevada statute enabling application of equity rule in action at law, see *Branson v. Industrial Workers of the World*, 95 Pac. 354 (Supm. Ct. Nev., 1908).

As to when union is not liable for unlawful acts of individual members thereof, see *Parkinson v. Building Trades Council*, 98 Pac.

1027, 1036 (Supm. Ct. Cal., 1908); *Russell v. Stammers, etc., Unions*, 57 Misc. 96; 107 N. Y. Suppl. 303 (Supm. Ct., Sp. T., 1907). Compare *Piano & Organ Workers' Union v. Piano & Organ Supply Co.*, 124 Ill. App. 353 (1906).

As to its liability for unlawful acts of its members engaged in picketing, see *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500, 523 (C. C. Nev., 1908).

As to liability of members of unions as individuals, see *Munday v. Terrel*, 87 Miss. 282; 39 So. 477 (1905).

As to relief by member against misapplication of funds, see *Howden v. Yorkshire Miners' Assoc.*, 1 K. B. (1903) 308; and note thereon in 19 Law Quart. Rev. 118 (1903).

Such unions have frequently been held liable by virtue of statute, thus *N. Y. Code Civ. Pro.*, §§ 1919, 1921. For similar provisions, see *Conn. G. S.* (1902), § 588; *Mich. Comp. Laws* (1897), § 10025, the validity of which, as applied to an action against a labor union, was declared in *U. S. Heater Co. v. Iron Molders' Union*, 129 Mich. 354; 88 N. W. 889 (1902); *N. J. G. S.* (1895), p. 2588; *Vt. Pub. Stat.* (1906), § 1448. It was by virtue of statute that there arose liability in the much-discussed and somewhat misunderstood decision in *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, App. Cas. (1901) 426. See article in 37 Am. Law Rev. 385 (1903) by J. G. Steffee; editorial note in 17 Law Quart.

criminal conspiracy. The origin of this supposed doctrine appears on a consideration of the social conditions that had prevailed in England for centuries, producing a series of statutes dating as far back as the fourteenth century, operating most oppressively upon the laboring classes.¹⁹ But this doctrine

Rev. 122, 342 (1901). Compare *Linaker v. Pilcher*, 70 L. J. Q. B. 396 (1901).

As to Trade Disputes Act of 1906, see article in 42 Am. Law Rev. 200 (1908) by C. R. Darling.

So it seems by virtue of statute in *F. R. Patch Manuf. Co. v. Protection Lodge*, 77 Vt. 294; 60 Atl. 74; 107 Am. St. Rep. 765 (1905; see supra); see *F. R. Patch Manuf. Co. v. Capeless*, 79 Vt. 1; 63 Atl. 938 (1906). See also *Wabash R. Co. v. Hanrahan*, 121 Fed. 563, 566 (C. C. Mo., 1903).

A trade union was held liable for the acts of its officers in procuring the discharge of an employee, in *Giblan v. National Amalgamated Labourers' Union*, 2 K. B. (1903) 600.

¹⁹ The doctrine has been thought to find support in such decisions as *King v. Journeymen Tailors of Cambridge*, 8 Modern, 10 (1721); *King v. Mawbey*, 6 T. R. 619, 636 (1796). The sentiment among the ruling classes who until recently controlled the courts as well as Parliament, is strikingly reflected in that remarkable and much-misunderstood decision, *Hilton v. Eckersley*, 6 El. & Bl. 47 (1855), where a combination among a number of mill owners, designed to secure unity of management, was held illegal, though the element of tendency to suppress competition did not enter into the case. It seems difficult to sustain the decision on any accept-

ed principle of law, as the objections urged against the combination seem equally applicable to an ordinary corporation or partnership. The real motive for the decision was the fear that, by an application of the homely maxim that "what is sauce for the goose is sauce for the gander," a decision sustaining the legality of the agreement would have been by analogy used to sustain the legality of combinations among workmen. Thus, it was said by Alderson, J., on appeal (p. 76): "If a bond of this sort *between masters* is capable of being enforced at law, an agreement to the same effect *amongst workmen* must be equally legal and enforceable; and so we shall be giving a legal effect to *combinations of workmen for the purpose of raising wages*, and make their strikes capable of being enforced at law" And so the agreement was held unlawful, even on the supposition that the object, viz., to protect against combinations of workmen, was lawful. As a logical result, this decision was followed in *Hornby v. Close*, 2 Q. B. 153 (1867), holding such combinations of workmen to be illegal. But the advance in public opinion is shown by the decision of the same court two years later, its constitution having been changed in the meantime, the court being now *equally divided* on the question of the legality of such combinations. *Farrer v. Close*, 4 Q. B. 602 (1869).

never gained foothold in this country, where it has been generally repudiated, and it may be regarded as established here, as a common-law principle, that a combination among wageworkers for the purpose of obtaining an increase of wages as well as for any other lawful purpose is entirely lawful,²⁰ the only question

²⁰ Following *King v. Journeymen Tailors of Cambridge*, 8 Modern, 10 (1721); *King v. Mawbey*, 6 T. R. 619, 636 (1796), such a combination was held illegal in *People v. Fisher*, 14 Wend. (N. Y.) 9; 28 Am. Dec. 501 (1835), which was, however, decided under the New York statute making it a misdemeanor to conspire to "*commit any act injurious to trade or commerce.*" But *People v. Fisher* is not law in New York since the enactment of Penal Code, § 170, *infra*. *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. (N. Y.) 168 (Supm. Ct., Sp. T., 1880). See observations upon *People v. Fisher* in *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 135; 38 Am. Dec. 346, 360 (1842); *Master Stevedores' Assoc. v. Walsh*, 2 Daly (N. Y.), 1, 4 (1867). But the American authorities generally are to the effect as stated in the text. Thus, *Master Stevedores' Assoc. v. Walsh*, *supra*, where the authorities were very critically examined, in a decision sustaining a by-law of an association of master stevedores providing for fixing prices for which members should work. Here the question was simply between the association and its members, in an action to enforce a penalty for violating the by-law. In view of the present agitation against contracts in restriction upon competition, it seems almost strange that the court did not consider the case from the standpoint from which a court would nowadays certainly consider

it, namely, whether the by-law was not void as tending to destroy competition. Other authorities holding or declaring that combinations to raise wages are not illegal are *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 817 (C. C. Ohio, 1894); *U. S. v. Cassidy*, 67 Id. 698, 711 (D. C. Cal., 1895); *Clemmitt v. Watson*, 14 Ind. App. 38; 42 N. E. 367 (1895); *Snow v. Wheeler*, 113 Mass. 179 (1873; sustaining association of workmen formed to protect themselves against "encroachments" from their employers, and agreeing not to teach others their trade without the permission of the association); *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 517; 77 N. W. 13, 21; 42 L. R. A. 407, 415; 74 Am. St. Rep. 421 (1898); *Moore v. Bricklayers' Union*, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889); *Longshore Printing Co. v. Howell*, 26 Oreg. 527; 38 Pac. 547; 28 L. R. A. 464; 46 Am. St. Rep. 640 (1894; sustaining a by-law limiting the number of apprentices to be employed in a newspaper office); *Queen Ins. Co. v. State*, 86 Tex. 250, 272; 24 S. W. 397, 405; 22 L. R. A. 483, 495 (1893). See also *Commonwealth v. Carlisle, Brightly* (Pa.), 36 (1821); *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969; 43 So. 590 (1907).

For a detailed account of early American decisions, see 1 Eddy on Combinations, c. 12. In some States the validity of such combinations

of legality being as to the means employed. And as a result of recent elaborate investigation, it must be considered as settled that the alleged doctrine never existed in England, independently of statute.²¹

§ 54. The "closed shop."—As a result of the existence of numerous labor unions, each animated by the jealous desire to procure employment for its own members to the exclusion of others, the question of the so-called "closed shop" lies at the bottom of many of present-day disputes between employer and em-

has been expressly declared by statute. Thus by N. Y. Penal Code, § 170, "the orderly and peaceable assembling or co-operation of persons employed in any calling, trade or handicraft, for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy." Identical therewith or similar thereto, are Minn. R. L. (1905), § 4868; Nev. Comp. Laws (1900), § 4751; N. D. Rev. Codes (1905), § 8770. See also Mont. Rev. Codes (1907), § 8289. For provisions similar in scope, see §§ 13, 57. In *Branson v. Industrial Workers of the World*, 95 Pac. 354 (Supm. Ct. Nev., 1908), the exception in Nev. Comp. Laws (1900), § 4751, supra, was held inapplicable to a boycott accompanied with intimidation and violence. See § 75. See as to N. Y. Penal Code, § 170, *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. (N. Y.) 168 (Supm. Ct., Sp. T., 1880; refusing injunction against a combination to entice from employment); *People ex rel. Gill v. Smith*, 5 N. Y. Crim. R. 509 (N. Y. Co. Oyer & Terminer, 1887; held not to legalize combination to compel discharge of employee, no question as to the rate of wages being involved); *People*

v. Barondess, 133 N. Y. 649; 31 N. E. 240 (1892; dissenting opinion of Gray, J., in 45 N. Y. State Rep. 248); reversing 61 Hun, 571, 581; 16 N. Y. Suppl. 436, 441 (1891); *Curran v. Galen*, 152 N. Y. 33; 46 N. E. 297; 37 L. R. A. 802; 57 Am. St. Rep. 496 (1897); *People v. Wilzig*, 4 N. Y. Crim. R. 403 (N. Y. Co. Oyer & Terminer, 1886); *People v. Kostka*, Id. 429 (N. Y. Co. Oyer & Terminer, 1886); *Rogers v. Evarts*, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891); *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903). That to accomplish the objects approved in § 170, none of the means declared by § 168 to be illegal can properly be used, see *People v. McFarlin*, 43 Misc. 591; 89 N. Y. Suppl. 527 (Monroe County Ct., 1904).

²¹ See Wright on Criminal Conspiracies and Agreements, p. 44; Stephen's History of the Criminal Law of England, vol. 3, pp. 202-227; 1 Eddy on Combinations, c. 11; articles in 17 Harv. Law Rev. 510 (1903-4) by A. V. Dicey; 3 Columbia Law Rev. 447 (1903) by W. A. Purrington; *Master Stevedores' Assoc. v. Walsh*, 2 Daly (N. Y.), 1 (1867).

ployee. Briefly, a "closed shop" is an establishment in which employment is conditioned upon membership in a specified organization, commonly a labor union. On the other hand an "open shop" is an establishment in which there is no such condition of employment.²² Strikes and boycotts have in numerous instances been instituted for the purpose of inducing an employer to enter into a "closed shop" agreement, that is, for the exclusive employment of members of a specified union. Until recently no question as to the legality of such an agreement seems to have been seriously raised.²³ It would seem clear enough on principle that it is in no essential respect different from the

²² In *Sackett & Wilhelm's Lithographing, etc., Co. v. National Assoc. of Employing Lithographers*, 61 Misc. 150; 113 N. Y. Suppl. 110 (Supm. Ct., Sp. T., 1908), was considered the effect of the following provision in the constitution of an association: "In the event of hostile action by a trade union towards a member of the association, the 'open shop' is to be established with reference to such hostile union." The court said: "The term 'open shop' has a distinctive trade meaning, and, in reference to trade matters, means that in selecting employees there shall be no discrimination against union or non-union men. . . . The moment men are discriminated against with reference to their employment because they are union men, the shop pursuing this policy becomes a 'closed shop.'"

²³ In *Stone Cleaning & Pointing Union v. Russell*, 38 Misc. 513; 77 N. Y. Suppl. 1049 (Supm. Ct., Sp. T., 1902), an injunction was refused against breach of a contract to employ members of a labor union exclusively, without any question being raised as to the legality of such agreement. Nor was any

such question raised in *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903), where were held illegal acts done for the purpose of obtaining such an agreement.

In *State v. Stockford*, 77 Conn. 227; 58 Atl. 769; 107 Am. St. Rep. 28 (1904), a combination to procure the execution of such an agreement was held to create no criminal liability under G. S. (1902), § 1296.

See as to legality of boycott for purpose of inducing exclusive employment of members of a union, under § 63, *Gray v. Building Trades Council*, 91 Minn. 171; 97 N. W. 663; 63 L. R. A. 753; 103 Am. St. Rep. 477 (1903); *Casey v. Cincinnati Typographical Union*, 45 Fed. 135; 12 L. R. A. 193 (C. C. Ohio, 1891); *Matthews v. Shankland*, 25 Misc. 604; 56 N. Y. Suppl. 123 (Supm. Ct., Sp. T., 1898). As to legality of strike for like purpose, see § 60. As to inducing breach of contract between employer and third person, see § 64.

In *Loewe v. Lawlor*, 208 U. S. 274; 28 Supm. 301; 52 L. Ed. 488 (1908), under the Federal anti-trust act (see § 191), relief was

everyday agreement to serve another exclusively, or to deal with another exclusively.²⁴ But recently the idea has been advanced that such an agreement is unlawful as "tending to create a monopoly" in favor of members of the unions, to the exclusion of

allowed against a boycott instituted for the purpose of compelling unionization of shops.

²⁴ Such an agreement was sustained in *Jacobs v. Cohen*, 183 N. Y. 207; 76 N. E. 5; 2 L. R. A. N. S. 292; 111 Am. St. Rep. 730 (1905); reversing 99 App. D. 481; 90 N. Y. Suppl. 854 (1904), that is, an agreement that the employer should not "employ any help whatsoever other than those belonging to, and who are members of" a certain union, "and in good standing, and who conform to the rules and regulations of" such union; also that the employer should "cease to employ any one and all those employees who are not in good standing, and who do not conform to and comply with the rules and regulations of" such union, "upon being notified to that effect by its duly credentialed representatives." Here was discussed at length the effect of *Curran v. Galen*, 152 N. Y. 33; 46 N. E. 297; 37 L. R. A. 802; 57 Am. St. Rep. 496 (1897); *National Protective Assoc. v. Cumming*, 170 N. Y. 315; 63 N. E. 369; 58 L. R. A. 135; 88 Am. St. Rep. 648 (1902). See also *Mills v. U. S. Printing Co.*, 99 App. D. 605, 612; 91 N. Y. Suppl. 185, 190 (1904).

In *McCord v. Thompson-Starrett Co.*, 129 App. D. 130; 113 N. Y. Suppl. 385 (1908), reversing 112 Id. 902 (1908), holding illegal the act of an association of employers in requiring that no member should employ a carpenter unless he joined

a particular union, it was said, citing as authority, *Curran v. Galen*, supra: "While an individual employer may lawfully agree with a labor union to employ only its members, because such an agreement is not of an oppressive nature, operating generally throughout the community to prevent craftsmen in the trade from obtaining employment and earning their livelihood, yet such an agreement when participated in by all or by a large proportion of employers in any community, becomes oppressive and contrary to public policy, because it operates generally upon the craftsmen in the trade, and imposes upon them, as a penalty for refusing to join the favored union, the practical impossibility of obtaining employment at their trade and thereby gaining a livelihood."

In *Brennan v. United Hatters of North America*, 73 N. J. Law, 729, 739; 65 Atl. 165, 169; 9 L. R. A. N. S. 254, 258; 118 Am. St. Rep. 727 (1906), where the validity of such agreements was doubted, it was suggested that whether *Curran v. Galen* is consistent with *Jacobs v. Cohen* "is a question that may require consideration at a future time." See also, as to validity of such provisions, *Birmingham Paint, etc., Co. v. Crampton*, 39 So. 1020 (Supm. Ct. Ala., 1905).

In *National Fireproofing Co. v. Mason Builders' Assoc.*, 145 Fed. 260 (C. C. N. Y., 1906), one engaged in the business of manufacturing and installing tile fireproof-

those seeking employment, not members of such unions, that is, as tending to create an illegal restriction upon competition.²⁵

§ 55. **Definition of strike.**—A combination to increase wages, usually, though not necessarily, takes the form of a strike. And

ing was denied relief by preliminary injunction against an agreement between builders' and bricklayers' unions described as "one by which the builders agree that they will take contracts for mason work only where such contracts include the installation of the fireproofing and that they will not sublet the same, but will use their own men for such installation." In *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969; 43 So. 590 (1907), was denied relief to an employer against enforcement by a labor union of a rule forbidding members to work for any one employing non-union labor. But in *Reynolds v. Davis*, 198 Mass. 294; 84 N. E. 457; 17 L. R. A. N. S. 162 (1908), relief was allowed to employers against a strike "against the open shop," that is, a strike, the occasion of which was the posting by employers in their shops of "open shop rules," including one thus providing: "There shall be no discrimination for or against any workman on account of membership or non-membership in any organization." See also, as to strike for purpose of obtaining recognition of "closed shop," § 60.

²⁵ *Christensen v. People*, 114 Ill. App. 40, 68 (1904), where, however, the point seems to have been unnecessary to the decision. The object of the strike under consideration was to "compel" the execution of such an agreement. The acts of violence and producing fear of violence seem to have been sufficient to justify the punishment

here imposed for violation of an injunction against such acts. Affirmed as *O'Brien v. People*, 216 Ill. 354; 75 N. E. 108; 108 Am. St. Rep. 219 (1905), without special consideration of this point. See also, as to application of prohibition of R. S., c. 38 (*Starr & Curtis' Ed.*, 1896), §§ 158, 159, against intimidation, and see previous decision in *Christensen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61 (1903).

In *Berry v. Donovan*, 188 Mass. 353; 74 N. E. 603; 5 L. R. A. N. S. 899; 108 Am. St. Rep. 499 (1905), where was sustained an action against a representative of a labor union for inducing discharge from employment, no justification was held furnished by the circumstance that the employers had previously agreed with the union for the employment of its members exclusively, and not to retain in their employment any worker after receiving notice from the union that such worker was objectionable to the union from any cause. To similar effect, *Curran v. Galen*, *supra*. The court said in *Berry v. Donovan* (188 Mass. 359; 74 N. E. 606; 5 L. R. A. N. S. 904): "If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country.

a strike is usually, though not necessarily, for the purpose of obtaining an increase of wages. We define a *strike* as a *simultaneous quitting of employment by a number of employees in pursuance of agreement*.²⁶

§ 56. **Strike as excuse for nonperformance of contract.**—In case of agreement to perform a contract within a time specified, nonperformance within such time is not, in the absence of agree-

Employers would be forced to yield to all their demands or give up business. . . . The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly."

See, on the general subject, articles in 41 Am. Law Rev. 197 (1907) by F. W. Grinnell; 18 Harv. Law Rev. 444 (1905) by W. D. Lewis; 20 Id. 253, 345, 428 (1907) by Jeremiah Smith; 42 Am. Law Rev. 706 (1908) by A. M. Brown.

²⁶ The following definitions of a strike have been given: "A concerted or general quitting of work by a body of men or women for the purpose of coercing their employer in some way, as when higher wages or shorter hours are demanded, or a reduction of wages is resisted; a general refusal to work as a coercive measure." Century Dictionary. "The act of combining and demanding higher wages for work; cessation from labor or neglect of duty in a spirit of mutiny or revolt." Webster. "A cessation from work, as of workmen, in order to extort higher wages; a revolt; a mutiny." Worcester. "A combination among laborers, those employed by others, to compel an increase of wages, a change in the hours of labor, some change in the mode and manner of conducting the business of the principal, or to enforce some particular policy in

the character or number of the men employed, or the like." Delaware, L. & W. R. R. Co. v. Bowns, 58 N. Y. 573, 582 (1874). (This definition was substantially adopted in Anderson's Law Dictionary.) "The act of a body of workmen employed by the same master, in stopping work all together at a prearranged time, and refusing to continue until higher wages or shorter time, or some other concession, is granted to them by the employer." Black's Law Dictionary. We consider all these definitions open to criticism, as including *intent* in the conception of a strike. More nearly resembling the definition given in the text is that of Kay, J., in Lyons v. Wilkins, 1 Ch. (1896), 811, 829, "an agreement between persons who are working for a particular employer not to continue working for him." In Farrer v. Close, 4 Q. B. 602, 612 (1869), the definition given by Hannen, J., is "a simultaneous cessation of work on the part of the workmen." In Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc., 59 N. J. Eq. 49; 46 Atl. 208 (1899), the definition given is "the organization of concerted, simultaneous cessation of work by bodies of workmen."

See, on the general subject, articles in 27 Am. Law Rev. 708 (1893) by U. M. Rose; 17 Crim. Law Mag. 1 (1895) by J. Z. Erwin.

ment to the contrary, excused by a strike of employees of the party on whom rests the obligation to perform.²⁷ This, however, is a contingency commonly expressly provided for in the contract.²⁸ In the absence of agreement to perform within a time specified, the delay has in some instances been held excused by a strike or acts incident to a strike.²⁹

²⁷ Thus, in case of a contract of carriage, *Shelby v. Missouri Pacific Ry. Co.*, 77 Mo. App. 205 (1898); *Blackstock v. N. Y. & Erie R. R. Co.*, 20 N. Y. 48; 75 Am. Dec. 372 (1859). See *Read v. St. Louis, Kansas City, etc., R. R. Co.*, 60 Mo. 199 (1875), *infra*; *Sterling v. St. Louis, Iron Mountain, etc., Ry. Co.*, 86 S. W. 655 (Tex. Civ. App., 1905). And so of the duty to undertake to carry, *People v. N. Y. Central, etc., R. R. Co.*, 28 Hun (N. Y.), 543, 557 (1883).

As to building contracts, see *Hexter v. Knox*, 39 Super. Ct. 109 (1875); affirmed in 63 N. Y. 561 (1876); *Serber v. McLaughlin*, 97 Ill. App. 104 (1901); *Neblett v. McGraw*, 103 S. W. 1113 (Tex. Civ. App., 1907). But delay by a building contractor was held excused by a strike of its employees, where the contractor had been delayed by the owner of the building. *Barnum v. Williams*, 115 App. D. 694; 102 N. Y. Suppl. 874 (1906); affirmed in 190 N. Y. 539; 83 N. E. 1122 (1907).

See article in 16 Harv. Law Rev. 555 (1902-3) by H. W. Chaplin.

²⁸ See, in case of contracts of carriage, *Hagerman v. Norton*, 105 Fed. 996; 46 C. C. A. 1 (5th C., 1901); *New Ruperra S. S. Co. v. 2,000 Tons of Coal*, 124 Fed. 937 (D. C. Mass., 1903); *Actieselskabet Barfod v. Hilton & Dodge Lumber Co.*, 125 Fed. 137 (D. C. Ga., 1903);

Dobell v. Green, 1 Q. B. (1900) 526; *Hulthen v. Stewart*, App. Cas. (1903) 389; *Elswick Steamship Co. v. Montaldi*, 1 K. B. (1907) 626; *Saxon Steamship Co. v. Union Steamship Co.*, 69 L. J. Q. B. 907 (1900); *Steel v. Grand Canary Coaling Co.*, 90 L. T. R. 729 (1904). Compare *Matter of Richardson*, 1 Q. B. (1898) 261. See, in case of building contracts, *Miller v. Norcross*, 92 App. D. 352; 87 N. Y. Suppl. 56 (1904). Compare *Morse Dry Dock & Repair Co. v. Seaboard Transp. Co.*, 154 Fed. 90 (D. C. N. Y., 1907). As to exemption from liability for demurrage under charter, see *W. K. Niver Coal Co. v. Cheronea S. S. Co.*, 142 Fed. 402; 73 C. C. A. 502; 5 L. R. A. N. S. 126 (1st C., 1905). As to contract of sale, see *Consolidated Coal Co. v. Jones & Adams Co.*, 232 Ill. 326; 83 N. E. 851 (1908).

²⁹ Thus, in case of a contract of carriage, *Empire Transp. Co. v. Philadelphia, etc., Coal & Iron Co.*, 77 Fed. 919; 23 C. C. A. 564; 35 L. R. A. 623 (8th C., 1897); *Marshall v. McNear*, 121 Fed. 428 (D. C. Cal., 1903); *Galveston, H. & S. A. Ry. Co. v. Karrer*, 109 S. W. 440 (Tex. Civ. App., 1908). See *Ga. Civil Code* (1905), 2283.

And so of a building contract, *Happel v. Marasco*, 37 Misc. 314; 75 N. Y. Suppl. 461 (Supm. Ct., Sp. T., 1902).

As to liability of carrier for in-

§ 57. Strike whether illegal apart from acts of violence, or acts producing fear of violence.—In the view we have taken, there is nothing illegal in a strike, apart from acts of violence or acts producing fear of violence. And this is the view that has generally prevailed in this country,³⁰ though, as will presently ap-

jury to passenger on conveyance operated during strike, see *Fewings v. Mendenhall*, 83 Minn. 237; 86 N. W. 96; 55 L. R. A. 713 (1901); 88 Minn. 336; 93 N. W. 127; 60 L. R. A. 601; 97 Am. St. Rep. 519 (1903); *Bosworth v. Union R. R. Co.*, 26 R. I. 309; 58 Atl. 982 (1904).

³⁰ *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 737; 19 L. R. A. 387, 391 (C. C. Ohio, 1893); *Arthur v. Oakes*, 63 Fed. 310, 318; 11 C. C. A. 209, 217; 25 L. R. A. 414, 425 (7th C., 1894); modifying *Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co.*, 60 Fed. 803; 25 L. R. A. 414 (C. C. Wis., 1894); *U. S. v. Elliott*, 64 Fed. 27, 32 (C. C. Mo., 1894); *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 917; 28 C. C. A. 99, 105 (8th C., 1897); *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 113, 124 (C. C. Neb., 1902); *Wabash R. Co. v. Hannahan*, 121 Fed. 563, 568, 570 (C. C. Mo., 1903); *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 171 (C. C. Wis., 1906); subsequent decision in *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A., 7th C., 1908); *Delaware, L. & W. R. Co. v. Switchmen's Union*, 158 Fed. 541 (C. C. N. Y., 1907); *Christensen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61, 71 (1903); *Clemmitt v. Watson*, 14 Ind. App. 38; 42 N. E. 367 (1895); *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*,

165 Ind. 421; 75 N. E. 877; 2 L. R. A. N. S. 788 (1905); *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 130; 38 Am. Dec. 346, 355 (1842); *Carew v. Rutherford*, 106 Mass. 1, 14; 8 Am. Rep. 287, 295 (1870); *Pickett v. Walsh*, 192 Mass. 572, 580; 78 N. E. 753, 757; 6 L. R. A. N. S. 1067, 1077; 116 Am. St. Rep. 272 (1906); *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 114; 30 Atl. 881, 885 (1894); *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, *infra*; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 761; 53 Atl. 230, 231 (1902); *Mills v. U. S. Printing Co.*, 99 App. D. 605, 608; 91 N. Y. Suppl. 185, 187 (1904); *Searle Manuf. Co. v. Terry*, 56 Misc. 265; 106 N. Y. Suppl. 438 (Supm. Ct., Sp. T., 1905); *Longshore Printing Co. v. Howell*, 26 Oreg. 527, 543; 38 Pac. 547, 552; 28 L. R. A. 464, 472; 46 Am. St. Rep. 640 (1894); *Waddey Co. v. Richmond Typographical Union*, 105 Va. 188; 53 S. E. 273; 5 L. R. A. N. S. 792 (1906). Alone to the contrary among recent decisions seems *Mapstrick v. Ramge*, 9 Neb. 390; 2 N. W. 739 (1879), but it is clear that the court did not consider the point. Nor is the right affected by *Re Debs*, 158 U. S. 564, 598; 15 Supm. 900, 911; 39 L. Ed. 1092 (1895), notwithstanding what may have been said in the decision in *U. S. v. Debs*, 64 Fed. 724, 763 (C. C. Ill., 1894), here affirmed. See previous decision in 63 Fed. 436 (C.

pear, a strike is even under these conditions not necessarily legal,

C. Ill., 1894). This decision (i. e., in 158 U. S. 564) has only an indirect bearing upon the subject of labor combinations. The relief granted was simply against interference with interstate commerce (see § 8) and it was expressly stated that the object of the bill was not "to restrain the defendants from abandoning whatever employment they were engaged in"; that "the right of any laborer or any number of laborers to quit work was not challenged." See, as to effect of Federal anti-trust act, § 191. This overrules what was said in *Waterhouse v. Comer*, 55 Fed. 149, 157; 19 L. R. A. 403, 407 (C. C. Ga., 1893), that in view of the Interstate Commerce Act and U. S. R. S., § 5440, "a strike or 'boycott,' as it is popularly called, if it was ever effective, can be so no longer." See also *Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co.*, 60 Fed. 803, 823; 25 L. R. A. 414, 429 (C. C. Wis., 1894), the notion expressed wherein (60 Fed. 819; 25 L. R. A. 426), that *compulsion and force* are essential elements of the definition of a strike, deserves severe condemnation. See modification of this decision in *Arthur v. Oakes*, supra (63 Fed. 327; 11 C. C. A. 226; 25 L. R. A. 432), holding that an order in broad terms restraining *strikes* by employees of a railroad operated by receivers should be limited to "those designed to physically cripple the trust property, or to actually obstruct the receivers in the operation of the road, or to interfere with their employees who do not wish to quit, or to prevent by intimidation or other wrongful modes, or by any device, the employment of others to take the

places of those quitting, and not such as were the result of the exercise by employees, in peaceable ways, of rights clearly belonging to them, and were not designed to embarrass or injure others, or to interfere with the actual possession and management of the property by the receivers."

By N. J. G. S. (1895), p. 2344 "it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise to persuade, advise or encourage by peaceable means any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation." To similar effect, Colo. R. S. (1908), § 3924; see also Mont. Rev. Codes (1907), § 8289. The purpose of the New Jersey provision, supra, was said in *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49; 46 Atl. 208 (1899), to have been "undoubtedly to legalize strikes."

By Pa. 2 P. & L. Dig., p. 2917, "it shall be lawful for employees, acting either as individuals or collectively, or as the members of any club, assembly, association, or organization, to refuse to work or labor for any person, persons, corporation or corporations, whenever in his, her or their opinion, the wages paid are insufficient, or his, her or their treatment is offensive or unjust, or whenever the continued labor or work by him, her or them would be contrary to the constitution, rules, regulations, by-laws, resolution or resolutions of any club, assembly, association, organization

that is, according to the prevailing view.³¹ In England, however, in accord with the alleged doctrine just considered, that a mere combination to obtain an increase of wages is illegal as a criminal conspiracy, there has at times been judicially declared the supposed doctrine that a mere strike is illegal,³² though, perhaps, without a very clear idea of the distinction between strikes that are, and those that are not, associated with acts of violence or acts producing fear of violence.

§ 58. **Sympathetic strike.**—In the view that we have taken, a strike is not made illegal by the circumstance of it being what

or meeting of which he, she or they may be a member, or may have attended" without creating a criminal liability for conspiracy. But this does not legalize using force or threats to hinder others from working. For previous provisions to similar effect, see p. 2913. As to effect of such statutes, see *Commonwealth v. Sheriff*, 15 Phila. 393 (1881). See also *Cote v. Murphy*, 159 Pa. St. 420; 28 Atl. 190; 23 L. R. A. 135; 39 Am. St. Rep. 686 (1894; see as to whether such statutes are unconstitutional as class legislation); *Flaccus v. Smith*, 199 Pa. St. 128; 48 Atl. 894; 54 L. R. A. 640; 85 Am. St. Rep. 779 (1901). That they do not deprive of a merely *civil* remedy, see *Erdman v. Mitchell*, 207 Pa. St. 79, 91; 56 Atl. 327, 331; 63 L. R. A. 534, 539; 99 Am. St. Rep. 783 (1903; suit in equity). For provisions similar in scope, see §§ 13, 53.

See, on the general subject, articles in 40 Am. Law Rev. 42 (1906) by J. W. Bryan; 42 Id. 200 (1908) by C. R. Darling; Id. 706 (1908) by A. M. Brown; 43 Am. Law Reg. N. S. 73 (1904) by C. R. Darling; 44 Id. 465 (1905) by W. D. Lewis.

³¹ Thus in *Reynolds v. Davis*, 198

Mass. 294; 84 N. E. 457; 17 L. R. A. N. S. 162 (1908); the legality of a strike was declared to depend upon "the purpose for which the employees strike." In *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 110, 114; 85 N. E. 897, 899 (1908), while the strike was held proper to enforce a demand "for higher wages and a shorter day," it was regarded as unnecessary to determine whether it was also proper to enforce "demands that all foremen shall be members of the unions, and that the business agent of the unions shall be allowed to visit any building under construction" (the employer being engaged in such construction).

³² *Hornby v. Close*, 2 Q. B. 153 (1867). But since the enactment in 1875 of the "Conspiracy and Protection of Property Act" (see § 53), strikes have been regarded as legal in England. See *Gibson v. Lawson*, 2 Q. B. D. (1891) 557; *Temperton v. Russell*, 1 Q. B. (1893) 715; *Lyons v. Wilkins*, 1 Ch. (1896) 811, 829; article in 17 Harv. Law Rev. 510 (1903-4) by A. V. Dicey. But see also, article in 19 Law Quart. Rev. 37, 182 (1903) by D. R. Chalmers Hunt.

has sometimes been termed a *sympathetic* strike,³³ the only difference between this and an ordinary strike being that, in case of the former, the object is not necessarily to influence the action of the employer of the striking employees, but that of some other employer with some purpose of whose employees the striking employees are in sympathy; as, for instance, where strikes are inaugurated on a number of lines of railroad for the purpose of influencing the proprietors of only *one* of these lines to grant an increase of wages

§ 59. Strike whether illegal because of malicious intent.—

³³ See, however, § 60. Compare, as to "solidarity of interest," § 46.

For prohibition against railroad employee "furthering the object of or lending aid to" a strike on another railroad, see Del. R. S. (1893), p. 928; N. J. L. 1903, c. 257, § 62; Pa. 2 P. & L. Dig., p. 3955.

In *Pickett v. Walsh*, 192 Mass. 572, 587; 78 N. E. 753, 760; 6 L. R. A. N. S. 1067, 1080; 116 Am. St. Rep. 272 (1898), although persons engaged in the trade of brick and stone pointing were denied relief against a strike by bricklayers and stone masons for the purpose of themselves obtaining such work of pointing (see § 60), they were allowed relief against a strike by bricklayers and masons employed by an employer with whom they (such bricklayers and masons) had no dispute, the purpose of the latter strike being to force the employer to force the other employer to yield to the demand of his employees. The court said: "Organized labor's right of coercion and compulsion is limited to strikes against persons with whom the organization has a trade dispute, or to put it in another way, we are of opinion that a strike against A, with whom the strikers have no

trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best." See discussion of *Pickett v. Walsh*, with other decisions in article in 42 Am. Law Rev. 706 (1908) by A. M. Brown.

In *Reynolds v. Davis*, 198 Mass. 294; 84 N. E. 457; 17 L. R. A. N. S. 162 (1898), where relief was allowed to employers against a strike "against the open shop" (see § 54), there were declared illegal (though it seems unnecessarily; see opinion of Knowlton, J.), rules of a labor union said to provide for decision of "grievances between an individual member of a union and his employer, which are not common to the union members as a class," and for enforcement of such decision by a strike on the part of all. It was said: "Such a strike would be a strike in the nature of a sympathetic strike, that is to say, it is a strike not to forward the common interests of the strikers, but to forward the interests of an individual employee in respect to a grievance between him and his employer where no contract of employment exists." See discussion of *Reynolds v. Davis*, with other decisions in

It has already been observed that, though a strike is usually for the purpose of obtaining an increase of wages, this is not necessarily the case. Obviously the motives inducing a mere quitting of employment may be various. There may be physical infirmity producing incapacity, the prospect of higher wages or more congenial surroundings in another place or line of employment, and so on. In such cases there is not necessarily involved any intent to inflict injury upon another person, save as an intent may be inferred to produce injury to the employer, by the inconvenience produced by the withdrawal of an employee or a number of employees. And in such cases there is ordinarily involved no question of the legality of the quitting. But a combination to quit employment very often involves a definite intent to inflict injury. In the view already taken, however, mere malice or malicious intent, that is, malice in fact, as distinguished from malice in law, should be entirely ignored as a test of the legality of a strike, though, as will presently be seen, there is observable a tendency to apply such test.³⁴ What ap-

42 Am. Law Rev. 706 (1908) by A. M. Brown.

See, on the general subject, articles in 20 Harv. Law Rev. 253, 345, 428 (1907) by Jeremiah Smith; 42 Am. Law Rev. 200 (1908) by C. R. Darling.

³⁴ For instance, in *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 818 (C. C. Ohio, 1894), it was said: "All the employees had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service." Such a tendency seems to have been strongly manifested in *State v. Stockford*, 77 Conn. 227; 58 Atl.

769; 107 Am. St. Rep. 28 (1904), where, under G. S. (1902), § 1296, making it a criminal offense to "threaten or use any means to intimidate any person to compel such person against his will, to do or abstain from doing any act which such person has a legal right to do . . . or injure or threaten to injure his property with intent to intimidate him," was sustained a conviction for the employment of certain methods in attempting to induce an employer to execute an agreement with members of a labor union. One of such methods being to induce a strike by his employees, it was held properly charged that "*if the real purpose of the strike was to ruin the employers' business by threats and intimidation, it was unlawful, and that a conspiracy for that purpose was a crime.*" It was also here said: "A strike may be

pears to us to be essentially a sound doctrine was thus stated with reference to the proposition that "if the motive be unlawful or be not for the good of the organization or some of its members, but prompted wholly by malice and a desire to injure others, then an act which would be otherwise legal becomes unlawful"; "I do not assent to this proposition, although there is authority for it. It seems to me illogical and little short of absurd to say that the everyday acts of the business world, apparently within the domain of competition, may be either lawful or unlawful, according to the motive of the actor."³⁵

§ 60. **Strike whether illegal because of intent to procure discharge of employee.**—As already indicated, the legality of an act of injury committed by an employee may be subjected to the test whether such act was the natural incident or outgrowth of the relation of employee. But it has also been observed that there is considerable diversity of opinion as to when an act is the natural incident or outgrowth of such relation, thus a strike or a boycott with intent to procure the discharge of an em-

lawful or it may be unlawful and criminal. Whether it is lawful or not *depends upon its object and the manner in which it is conducted.* A combination to cause a strike *for the purpose of injuring and destroying the business and property of another or depriving another of his liberty or property without just cause is both unlawful and criminal.*

³⁵ National Protective Assoc. v. Cumming, 170 N. Y. 315, 326; 63 N. E. 369, 371; 58 L. R. A. 135, 140; 88 Am. St. Rep. 648 (1902), where, however, the decision did not necessarily rest on that ground. See Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 761; 53 Atl. 230, 231 (1902); Wabash R. Co. v. Hannahan, 121 Fed. 563, 571 (C. C. Mo., 1903). So the legality of a strike was sustained where the intent was to enforce a rule as to

the number of apprentices to be employed by the employer. Longshore Printing Co. v. Howell, 26 Ore. 527; 38 Pac. 547; 28 L. R. A. 464; 46 Am. St. Rep. 640 (1894). In Arthur v. Oakes, 63 Fed. 310, 319; 11 C. C. A. 209, 218; 25 L. R. A. 414, 426 (7th Cir., 1894), it was said: "The fact that employees of railroads may quit under circumstances that would show bad faith upon their part, or a reckless disregard of their contract or of the convenience and interests of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual affirmative performance of merely personal services, or (which is the same thing) require employees, against their will, to remain in the personal service of their employer."

ployee.³⁶ This situation tends to arise frequently nowadays in consequence of the efforts already alluded to on the part of labor unions to obtain employment for their own members exclusively. Hence, strikes or threats or announcements of intention to strike, with the purpose of inducing an employer to discharge from employment one not a member of such union. We shall presently observe that what seems to us to be the anomalous doctrine of liability for inducing to quit employment generally prevails, also that such doctrine has been conversely applied so as to create a liability for inducing an employer to discharge an employee. Here merely noting our disapproval of such doctrine, and such application thereof, we assume their soundness. But the question for present consideration is whether a strike, otherwise legal, is made illegal because with intent otherwise concededly illegal, that is, to induce an employer to discharge an employee (commonly, but not necessarily, a fellow-employee of those striking). On this much-debated point there is a seemingly irreconcilable difference of opinion. On the one hand the supposed illegality of the intent is thought to render illegal the act otherwise legal, that is, a strike with such intent is held to be illegal.³⁷ On the other hand, the act otherwise legal is thought

³⁶ See § 45.

³⁷ In *Plant v. Woods*, 176 Mass. 492; 57 N. E. 1011; 51 L. R. A. 339; 79 Am. St. Rep. 330 (1900), the contest was between "two labor unions of the same craft" (here designated as A and B), the plaintiff union (A) being composed of workmen who had withdrawn from the defendant union (B). B, desirous of "having all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business," took the following measures to cause the members of A to become members of B. They requested those employing members of A to induce the latter to apply for re-

instatement in B. Although there were no threats of personal violence, and although the members of B did not even expressly ask that the members of A be discharged, yet it was found from the circumstances of these requests, that the members of B intended that the employers should fear trouble in their business if they continued to employ the members of A, and that employers to whom these requests were made were justified in believing, and did believe, that a failure on the part of their employees who were members of A to apply for reinstatement, and a failure on the part of the employers to discharge them for not doing so would lead to trouble in the business of the

not to be made illegal because of the illegality of the intent, that

employers in the nature of strikes or a boycott; that certain strikes appeared to have been steps taken by the members of B to obtain the discharge of such employees as were members of A, who declined to apply for reinstatement. In at least one instance they threatened to leave an employer's place of business off a "fair list" to be published. It was said (176 Mass. 502; 57 N. E. 1015; 51 L. R. A. 344): "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition." It was, however, said by Holmes, C. J., dissenting (176 Mass. 505; 57 N. E. 1016; 51 L. R. A. 345), and holding that "the purpose of the threatened boycotts and strikes was such as to justify the threats": "That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might

use in the final contest." The decision is perhaps sustainable, not on the ground of there being anything inherently unlawful in the mere combination to induce the employer to discharge the members of A, but on the ground of the illegality of certain acts accompanying the mere inducements, that is, of threats to do injury, for so was regarded the "threat to strike," taken in connection with the intimation that the employer may "expect trouble in his business."

In *Erdman v. Mitchell*, 207 Pa. St. 79; 56 Atl. 327; 63 L. R. A. 534; 99 Am. St. Rep. 783 (1903), where the contest was between members of different labor unions under conditions similar to those under consideration in *Plant v. Woods*, a like conclusion was reached in granting relief against representing to the plaintiffs' employers that they would "suffer loss or trouble in their business" for employing the plaintiffs. The occasion of granting such relief was the action of the defendants, members of unions, in causing a strike on a building in course of construction because of the employment thereon of workmen not members of the defendants' unions. It does not appear that there was any violence or threat of violence.

In *Carter v. Oster*, 112 S. W. 995 (Ct. App. Mo., 1908), was sustained liability to a non-union employee for causing his discharge by threats to strike, besides extorting from the employer a heavy fine for having employed him. See as to damages for mental suffering.

In *Giblan v. National Amalgamated Labourers' Union*, 2 K. B. D.

is, a strike with such intent is held to be legal.³⁸ To us the latter view seems clearly the sound one. Though a strike with such intent seems sometimes to have been regarded as purely malicious, that is to say, as being purely with intent to injure the

(1903) 600, a labor union and officers thereof were held liable for procuring the discharge of an employee, by notifying the employer that if he were not discharged the members of the union in his employment would be "called out." It was held an insufficient justification of their action that they desired to compel such employee to pay the arrears of his defalcation as a former officer of the union.

In Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 730; 19 L. R. A. 387 (C. C. Ohio, 1893), an injunction was granted against the chief executive of an association of railroad employees (the Brotherhood of Locomotive Engineers) to restrain him from enforcing any rule requiring the employees of certain companies to refuse to handle and deliver freight transported by or to a certain company, and from inducing them to refuse to extend to such company facilities for exchange of traffic. This was simply the case of the refusal of employees to do their

work. It does not appear that they were under contract. But the court sought to justify the injunction on the ground that the *intent* of the employees was to induce their respective companies to refuse to deal with such other company, with the ultimate purpose of inducing the latter to discharge certain employees (engineers not members of the Brotherhood). Stress was laid on the circumstance that the employees taking such action "were not dissatisfied with the terms of their employment." The court said, in reply to the claim that an employee has the right to quit his employment, apart from contractual liability (54 Fed. 737; 19 L. R. A. 391): "Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, *for the purpose of inducing, procuring or compelling* that other to commit an unlawful or criminal act, the withholding or

³⁸ In National Protective Assoc. v. Cumming, 170 N. Y. 315; 63 N. E. 369; 58 L. R. A. 135; 88 Am. St. Rep. 648 (1902); affirming 53 App. D. 227; 65 N. Y. Suppl. 946 (1900), neither a labor union nor any individual member thereof, was held to have a right of action against a rival labor union or the members thereof because of the latter union refusing to permit its members to work upon any "job"

where the members of the former were employed, and informing the employer in each instance that unless the members of the former were discharged, its (the latter's) members would abandon the job. As a result members of the former were discharged and their places filled by members of the latter. As reasons apparent from the facts and justifying the strike were "the desire of the organization that its

employee whose discharge is sought, and without intent to benefit those engaged in the strike, it has been well pointed out that such is not necessarily at least the case; that the legality of such strike may be sustained on the ground that it is a natural inci-

bestowing of his labor for such a purpose is itself an unlawful and criminal act." The decision was based not solely on the ordinary rules applicable to strikes or boycotts, but on the additional ground that the refusal to handle freight (being interstate freight) was in direct violation of the Interstate Commerce Law; hence the reference to inducing another "to commit an unlawful or criminal act." So in *State v. Donaldson*, 32 N. J. Law, 151; 90 Am. Dec. 649 (1867), it was held an indictable offense for workmen to combine to compel their employer to discharge certain of their fellow-workmen, the means adopted to enforce this concession being an announced determination to quit their employment in a body and by a simultaneous act. The authorities relied on are two English *nisi prius* cases, where the point was but briefly considered, *Rex v. Ferguson*, 2 Starkie, 431 (1819); *Rex v. Bykerdike*, 1 Moody & Rob. 179 (1832). Compare *People v. Trequier*, 1 Wheeler Cr. Cas.

(N. Y.) 142 (1823); *People v. Melvin*, 2 Id. 262 (1810); *Master Stevedores' Assoc. v. Walsh*, 2 Daly, 1, 13 (1867); *Reg. v. Hewitt*, 5 Cox C. C. 162 (1851); *Reg. v. Bunn*, 12 Id. 316 (1872). To similar effect with *State v. Donaldson* is *State v. Dyer*, 67 Vt. 690; 32 Atl. 814 (1895), though here it does not appear that the guilty parties were employees; nor indeed does it appear what was their previous relation to the matter.

Compare, under § 62, decisions as to whether a *boycott* is illegal because of intent to procure discharge of employee.

As to allowance of relief against strike "against the closed shop," see § 54.

See, on the general subject, articles in 18 Harv. Law Rev. 423 (1905) by E. W. Huffcut; 20 Id. 253, 345, 428 (1907) by Jeremiah Smith; 40 Am. Law Rev. 42 (1906) by J. W. Bryan; 42 Id. 200 (1908) by C. R. Darling; Id. 706 (1908) by A. M. Brown; 43 Am. Law Reg. N. S. 73 (1904) by C. R. Darling.

own members may do the work the non-members are performing," also the desire to restrict their membership to careful and skillful workmen, and prohibit their members from working with members of other organizations maintaining a lower standard or none at all—in view of the legal doctrine absolving an employer from liability for injuries resulting from the negligence of a coemployee. In the decision

below, *Curran v. Galen*, 152 N. Y. 33; 46 N. E. 297; 37 L. R. A. 802; 57 Am. St. Rep. 496 (1897) (for facts, see § 72), was distinguished on the ground that in the case at bar the acts of the organization in question did not tend to prevent the members of the plaintiff organization "from obtaining work at any place, except where its members were employed." In one of the opinions (170 N. Y. 334; 63 N. E.

dent or outgrowth of the relation of employee, that is, in the interest of the striking employees, or, if what we have called the doctrine of "solidarity of interest" be given effect, in the interest of those in "solidarity of interest" with the striking employees.

374; 58 L. R. A. 143), *Curran v. Galen* was distinguished on the ground that there was malice and a "threat of a resort to illegal methods." See *Jacobs v. Cohen*, 99 App. D. 481; 90 N. Y. Suppl. 854 (1904); *Mills v. U. S. Printing Co.*, 99 App. D. 605, 614; 91 N. Y. Suppl. 185, 191 (1904). To similar effect with *National Protective Assoc. v. Cumming* is *Wunch v. Shankland*, 59 App. D. 482; 69 N. Y. Suppl. 349 (4th Dept., 1901), where, however, though the facts were similar, it is not apparent, as in *National Protective Assoc. v. Cumming*, that the act of procuring the discharge tended to obtain employment for the person procuring the discharge or for members of the same organization. Thus the person sought to be discharged was a machinist and not a compositor, while, so far as appears, the members of the organization seeking to procure his discharge were all compositors. The case would seem then, rather akin to *Curran v. Galen* than *National Protective Assoc. v. Cumming*.

In *Mills v. U. S. Printing Co.*, 99 App. D. 605, 612; 91 N. Y. Suppl. 185, 189 (1904), was refused an injunction against discharge of employees, though such discharge was the result of an agreement between the employer and a union entered into by the employer in order to end a strike and a boycott, and by which the union secured the exclusive employment of its members, as well as an adjustment of wages and a determination of

working hours. Here it was provided in the agreement that the complaining employees might be admitted to the union, the court saying: "It would seem that the purpose was not to drive out non-union men that places might be made for union men, but to assure that there should be no employees in this branch who were not members of the union. It may well be that the union deemed it essential to the interests of its members who were employed that all the employees should be allied as to act henceforth in concert on questions of wages, work hours, privileges, or of the employment of only those to work with them, who were approved by them as skillful and competent." The right to strike with intent to procure the discharge of a fellow-employee was also recognized in *Davis v. United Portable Hoisting Engineers*, 28 App. D. 396; 51 N. Y. Suppl. 180 (1898), a case of a labor union procuring the discharge of a non-union employee, by an announcement of an intention to order members of the union to leave the employment of the same employer. To similar effect, *Tallman v. Gaillard*, 27 Misc. 114; 57 N. Y. Suppl. 419 (Supm. Ct., Sp. T., 1899). See *People v. McFarlin*, 43 Misc. 591; 89 N. Y. Suppl. 527 (Monroe County Ct., 1904). So the announcement of such intention under such conditions was, in *People v. Davis*, 57 Alb. Law Jour. 170 (Cook Co., Ill., Crim. Court, 1898), held not within the prohibition of

But under what conditions is such act in their interest? In recognizing the right to strike with the intent to procure the discharge of employees, it has been well said: "It is their right to strike, if need be, in order to secure any lawful benefit to the

a statute against "conspiring or agreeing together with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business, or employment or property of another." Here, however, it did not appear that there was any contract of employment for any definite period. Compare, however, *Connell v. Stalker*, 20 Misc. 423; 45 N. Y. Suppl. 1048 (N. Y. City Ct., 1897); affirmed in 21 Misc. 609; 48 N. Y. Suppl. 77 (1897). So in *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 128; 38 Am. Dec. 346, 354 (1842), it was held not unlawful for employees to "form themselves into a society and agree not to work for any person who should employ any journeyman or other person not a member of such society, after notice given him to discharge such workman." The court, however, interpreted such agreement as not applying to the discharge of a person "engaged by contract for a certain time, in violation of such contract." *Commonwealth v. Hunt* was, in *State v. Donaldson*, 32 N. J. Law, 151, 157; 90 Am. Dec. 649, 653 (1867) (see § 60), distinguished on what seems to us to be the unsubstantial ground, that the agreement to quit employment was in the form of a *regulation of the society*, and not specifically directed against any particular individual, or, to use the language of the court: "The force of this association was not concentrated with a view to be exerted to oppress any individual." *Com-*

monwealth v. Hunt was distinguished on the same ground in *Crump v. Commonwealth*, 84 Va. 927, 943; 6 S. E. 620, 629; 10 Am. St. Rep. 895, 909 (1888).

The right to strike with intent to procure the discharge of an employee was also recognized in *Clemmitt v. Watson*, 14 Ind. App. 38; 42 N. E. 367 (1895). See also *Perreault v. Gauthier*, 28 Canada Supm. Ct. 241 (1898); *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 761; 53 Atl. 230, 231 (1902); *Reform Club of Masons & Plasterers, etc., v. Laborers' Union Protective Soc.*, 29 Misc. 247; 60 N. Y. Suppl. 388 (Supm. Ct., Sp. T., 1899).

In view of *Quinn v. Leathem*, App. Cas. (1901) 495, *Allen v. Flood*, App. Cas. (1898) 1, can no longer be regarded as authority to sustain the right to strike or announce one's intention to strike for the purpose of procuring the discharge of an employee. There a "delegate" of a labor union was held not liable for procuring the discharge of day laborers (with a promise not to employ them again), by stating to the employers that members of the union in their employ would quit employment unless such laborers were discharged. They had become offensive to ironworkers who were not only members of the union, but also their fellow-employees, by reason of having, though shipwrights, previously worked for certain employers on "ironwork." The decision proceeded on the express supposition that

several members of the organization, as for instance, to secure the re-employment of a member they regard as having been improperly discharged, and to secure from an employer of a number of them employment for other members of their organiza-

this was not a case of breach of contract, but merely of discharge from employment. See elaborate analysis of decision in 1 Mich. Law Rev. 28 (1902-3) by H. L. Wilgus; article in 14 Law Quart. Rev. 129 (1898) by F. Pollock.

Allen v. Flood was thus distinguished in Quinn v. Leatham (p. 506; see also p. 532). "The defendant neither uttered nor carried into effect any threat at all; he simply warned the plaintiff's employers of *what the men themselves, without his persuasion or influence, had determined to do*, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men, which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the defendant actuated in what he did by the desire to express his own views in favor of his fellow-members." See editorial note in 18 Law Quart. Rev. 1 (1902).

See elaborate discussion of effect of Allen v. Flood and Quinn v. Leatham in Booth v. Burgess, 65 Atl. 226, 234 (Ct. Ch. N. J., 1906); Brennan v. United Hatters of North America, 73 N. J. Law, 728, 746; 65 Atl. 165, 172; 9 L. R. A. N. S. 254, 262 (1906).

Compare § 62, as to whether a boycott is illegal because of intent to procure discharge of employee.

In Pickett v. Walsh, 192 Mass. 572; 78 N. E. 753; 6 L. R. A. N. S. 1067; 116 Am. St. Rep. 272 (1906), persons engaged in the trade of brick and stone "pointing" were denied relief against a strike by bricklayers and stone masons for the purpose of themselves obtaining such work of pointing, or as said by the court, "to put it more accurately, a combination by the defendants, who are bricklayers and masons, to refuse to lay bricks and stone where the pointing of them is given to others" (192 Mass. 583; 78 N. E. 758; 6 L. R. A. N. S. 1078). It was also said: "The case is one of competition between the defendant unions and the individual plaintiffs for the work of pointing. . . . The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or if you please, cannot get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stones which they lay. . . . It was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work of pointing them when laid." It was also said (192 Mass. 585;

tion who may be out of employment, although the effect will be to cause the discharge of other employees who are not members. And whenever the courts can see that a refusal of members of an organization to work with non-members may be in the interest of the several members, it will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice and to inflict injury upon such non-members." ³⁹

§ 61. **Inducing refusal to deal.**—In the view already taken there is nothing illegal in merely inducing refusal to deal. But it has been seen that some special relation is generally regarded as necessary for the purpose of justifying such inducing, at any rate, when the act of inducing is that of a combination as distinguished from a mere individual, and committed with malice.

78 N. E. 759; 6 L. R. A. N. S. 1079): "We cannot say on the evidence that pointing is something foreign to the work of a bricklayer or a stone mason, and therefore something which a union of bricklayers and stone masons have no right to compete for or insist upon." So held, though the contractors preferred to give the work to the pointers, it being to their advantage to do so, and though the result was disastrous to the pointers, who could not lay brick or stone. A protest of the defendant unions against the plaintiffs being allowed to organize a pointers' union was said to be "not an act of oppression," it not appearing that such unions were unwilling to admit the plaintiffs to membership, if qualified as bricklayers or stone masons. See discussion of *Pickett v. Walsh*, with other decisions in article in 42 Am. Law Rev. 706 (1908) by A. M. Brown.

³⁹ *National Protective Assoc. v. Cumming*, 170 N. Y. 315; 63 N. E.

369; 58 L. R. A. 135; 88 Am. St. Rep. 648 (1902). In *Mills v. U. S. Printing Co.*, 99 App. D. 605, 613; 91 N. Y. Suppl. 185, 190 (1904), it was said: "There is a manifest discrimination well recognized between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none other, and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. In the first case the action of the combination is primarily for the betterment of its fellow-members. In the second case such action is primarily 'to impoverish and to crush another' by making it impossible for him to work there, or so far as may be possible, anywhere. The difference is between combinations for welfare of self and that for the persecution of another." Compare § 62, as to whether a boycott is illegal because of intent to procure discharge of employee.

It seems clear enough that the relation of employee is sufficient for this purpose.⁴⁰

§ 62. **Boycott by employee.**—In the view already taken there is nothing illegal in a boycott, apart from acts of violence or acts producing fear of violence. *A fortiori* is this the case if the boycott is merely the natural incident or outgrowth of some lawful relation. But it has also been seen that there has rather extensively prevailed the doctrine that a boycott is inherently illegal even apart from violence. In this view a boycott is not justified even by the circumstance of it being the natural incident or outgrowth of the relation of employee. Hence, as in case of a boycott by a trade competitor,⁴¹ have resulted two apparently irreconcilable classes of decisions; one sustaining the legality of a boycott as an incident or outgrowth of such relation,⁴² the other holding a boycott inherently illegal,

⁴⁰ See, however, as to boycott by employee, §§ 62 et seq. As to inducing to discharge from employment, see §§ 71, 72; inducing to refuse to enter or continue in employment, §§ 65 et seq.

⁴¹ See § 34.

⁴² On the general question of the legality of boycotts, see § 25. In harmony with the view stated in the text seems *Parkinson v. Building Trades Council*, 98 Pac. 1027 (Supm. Ct. Cal., 1908), where an employer was denied relief against a boycott instituted to secure enforcement of a rule prohibiting members of unions from working with non-union men, and from handling or using material supplied by a dealer declared "unfair" because of his having employed non-union men. Such rule had been adopted before there was any controversy with the employer and without any special reference to it. As a result of notices sent to contractors employing union labor, that the employer had

been placed on an "unfair" list, and that union men could not work for or handle any material furnished by it, its union employees quit their employment and contractors purchasing from it ceased to do so. With reference to the word "unfair" as thus used, it was said (98 Pac. 1032): "Such declaration means, and in this instance was understood . . . to mean, . . . that it (the employer) had refused to comply with the conditions upon which union men would consent to remain in its employ or handle material supplied by it."

In *Sinsheimer v. United Garment Workers*, 77 Hun, 215; 28 N. Y. Suppl. 321 (1894), where a controversy was in existence between a combination of employers and one of employees, an injunction against the issuance by such employees of circulars requesting the customers of certain members of the combination of employers not to deal with them was refused, there being no proof

irrespective of the existence of such relation.⁴³ The former

of "violence, injury to property, threats or intimidation." The court said: "At best the circulars were but one of the instruments used by the defendants in their contest with the association of which the plaintiffs were members." To similar effect, *Cohen v. United Garment Workers*, 35 Misc. 748; 72 N. Y. Suppl. 341 (Supm. Ct., Sp. T., 1901); *Butterick Publishing Co. v. Typographical Union No. 6*, 50 Misc. 1; 100 N. Y. Suppl. 292 (Supm. Ct., Sp. T., 1906). See, under N. Y. Penal Code, § 168, subd. 5, *People v. Radt*, 15 N. Y. Crim. R. 174; 71 N. Y. Suppl. 846 (N. Y. Gen. Sess., 1900). The court in *Sinsheimer v. United Garment Workers*, broadly declared the right of the defendants "to endeavor to persuade those who had been accustomed to deal with" members of the association (to which the plaintiffs belonged) to discontinue their trade. The decision seems, however, to mainly rest on the fact that the plaintiffs did not come into court "with clean hands," being members of a combination of employers who had employed methods similar to those that they now complained of. Compare, as to methods adopted by way of retaliation, *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 125; 30 Atl. 881, 890 (1894). The decision in *Sinsheimer v. United Garment Workers* was a reversal of 5 Misc. 448; 26 N. Y. Suppl. 152 (1893), holding that "it was clear that it was an unlawful injury to plaintiffs' property to send circulars to their customers which would tend to induce such customers to discontinue business with the plaintiff."

⁴³ In *Quinn v. Leatham*, App. Cas. (1901) 495, an action by an employer against members of a labor union was sustained on the basis of a finding of "maliciously conspiring to induce" a customer of the employer not to deal with him, such customer being thus induced not to deal with him. It was said by Lord Lindley (p. 536), that what the defendants did was "to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ." Neither the employer nor any of his employees was a member of the union, though he was willing to have them join and had even requested to have them admitted as members. There was no dispute between him and them. The object of the boycott was to procure their discharge. On principle the boycott seems to us to have been justifiable as promoting a purpose to secure employment for members of the union exclusively, especially in view of a rule of the union making it "the duty of all members to assist their fellow-unionists to obtain employment in preference to non-society men" (p. 495). It was here said: "It cannot be—it was not even suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules according to the statutory requirement, or in support of any lawful right of the association or any member of it, or to obtain or maintain fair hours of labor or fair wages, or to promote a good understanding between employers and employed and workman and workman, or for the

view we regard as the sound one, but it is the latter that seems thus far sustained by the weight of authority.

settlement of any dispute, for none had existence." (Lord Brampton, p. 528, and see remarks of Lord MacNaghten, p. 511.) This language seems to leave room for the inference that there are conditions under which a boycott by employees might be justified. So *Allen v. Flood*, App. Cas. (1898) 1, was distinguished by Lord Shand (p. 514), as a case where the purpose of the defendant was to promote his own trade interest. That the acts here involved were not "in contemplation or furtherance of a trade dispute between employers and workmen" within the meaning of the Conspiracy & Protection of Property Act of 1875, see pp. 511, 541.

It seems clear that the term *maliciously*, as used in the finding above referred to, was understood as having reference to *malice in law* rather than to *malice in fact*, that is, merely to an act done *in the absence of any relation of which the act was a natural incident or outgrowth*. Thus it was said by Lord Shand (p. 515): "The defendants have no such defense as legitimate trade competition. Their acts were wrongful and *malicious in the sense found by the jury*, that is to say, they acted by conspiracy *not for any purpose of advancing their own interests as workmen*, but for the sole purpose of injuring the plaintiff in his trade." With reference to the meaning of the words "wrongfully and maliciously" the jury had been charged (pp. 500, 512), that "they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, *securing*

or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts as proved were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him *as distinguished from acts legitimately done to secure or advance their own interests.*" See elaborate discussion of effect of *Quinn v. Leatham* and of *Allen v. Flood* in *Booth v. Burgess*, 65 Atl. 226, 234 (Ct. Ch. N. J., 1906).

Similarly in *Gray v. Building Trades Council*, 91 Minn. 171; 97 N. W. 663; 63 L. R. A. 753; 103 Am. St. Rep. 477 (1903), an injunction was allowed to employers against a boycott by a labor union, or rather association composed of delegates from different unions, instituted for the purpose of compelling the employment of union labor only, there being no contention as to wages.

An injunction was allowed under like conditions in *Loewe v. California State Federation of Labor*, 139 Fed. 71 (C. C. Cal., 1905), where the complainants were extensively engaged in manufacturing and the defendants were large labor organizations, comprised in the American Federation of Labor "having jurisdiction over all classes of labor throughout the United States, and having in the neighborhood of 2,000,000 members." *Loewe v. California State Federation of Labor* was applied in *Seattle Brewing &*

§ 63. Solidarity of interest as justifying boycott; secondary

Malting Co. v. Hansen, 144 Fed. 1011 (C. C. Cal., 1905). So in *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997 (Supm. Ct. Mo., 1908), where such was the purpose of the boycott, an injunction was allowed against the action of unions in prohibiting their members from working for builders, contractors and others using materials manufactured by the plaintiff.

It was, however, held not illegal in *Gray v. Building Trades Council*, to notify customers or prospective customers, that such employers were "unfair" (91 Minn. 184; 97 N. W. 668; 63 L. R. A. 760), it not appearing that such notification had any special significance or pretended injury or was intended as a threat or intimidation. See, however, writ of injunction in *Loewe v. California State Federation of Labor*.

In *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531; 81 Pac. 1069; 4 L. R. A. N. S. 302 (1905), the acts held illegal included the congregation of pickets about the entrance to the employer's place of business, who induced persons to refrain from patronizing him.

In *People v. McFarlin*, 43 Misc. 591; 89 N. Y. Suppl. 521 (Monroe County Ct., 1904), where, as expressly stated, there was no violence or threat to do any violent act, such a boycott, under like conditions, was held within the prohibition of N. Y. Penal Code, § 168, subd. 5, against conspiring "to prevent another from exercising a lawful trade or calling," and an indictment therefor was sustained. Here, too, the prohibition of § 168, subd. 6, against conspiring "to commit

any act injurious to trade or commerce" was held applicable to the action of the members of the unions (who comprised in their membership by far the larger part of those employed in Rochester in carpenter and joiner work), in threatening employers engaged in the business of building, with a boycott unless they agreed to purchase materials only of such manufacturers as had received the approval of the union. This, on the ground that the members of the union would thereby be in a position "materially to limit and restrain the entire business of construction of buildings and the manufacture of woodworking material in Rochester and to control the supply as well as the price of labor in those factories and on those buildings." Reference was also made in this connection to the anti-trust act (L. 1899, c. 690; see § 224).

For instances of injunctions allowed against boycotts instituted for the purpose of compelling employment of union labor only, see *Purvis v. Local No. 500, United Brotherhood of Carpenters & Joiners*, 214 Pa. St. 348; 63 Atl. 585; 12 L. R. A. N. S. 642; 112 Am. St. Rep. 757 (1906; see as to effect of act of June 16, 1891, P. L. 300); *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*, 66 Atl. 953 (Ct. Ch. N. J., 1907).

In *Moores v. Bricklayers' Union*, 7 Ry. & Corp. L. J. 108 (Super. Ct. Cin., 1889), an action was sustained against a labor union and members thereof, for damage consisting of withdrawal of custom caused by sending to the plaintiff's customers notice that members of the

boycott.—Assuming, however, the legality of a boycott against

union would not use material supplied by the plaintiff, the motive of such action being the refusal of the plaintiff to accede to the defendants' request to refuse to deal with persons (P. Bros.) with whom, as employees, they had a controversy. Here we submit that the real question was whether the relation *between the defendants and P. Bros.* was not such as to justify the defendants in using the boycott as a weapon. In this view the following considerations advanced by the court seem to us to be entirely irrelevant: "*The dealings between P. Bros. and their material-men, or between such material-men and their customers, had not the remotest natural connection either with defendants' wages or their other terms of employment. There was no competition or possible contractual relation between plaintiffs and defendants, where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which in its exercise brought them into legitimate conflict with the right of defendants to dispose of their labor as they chose.*"

In *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48 (C. C. N. Y., 1887), the boycott was by what was known as the "Executive Board of the Ocean Association of the Longshoremen's Union." It would seem, though it does not distinctly so appear, that the employees in whose behalf the boycott was instituted were members thereof, but the court said that the defendants were "not in plaintiff's employ," and acted "without any legal justification, so far as appears,—a mere

dispute about wages, the merits of which are not stated, not being any legal justification." So in *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 115, 136; 30 Atl. 881, 886, 894 (1894), an injunction was allowed on complaint of the proprietors of a newspaper (the "Newark Times") against a boycott by a number of labor unions representing different trades in Newark, and affiliated in a society or representative body. The members of only one of these unions had any grievance against the complainant, the action of the others being sympathetic. The injunction was one "restraining them from distributing or circulating any circulars, printed resolutions, bulletins or other publications containing appeals or threats against the Newark Times or the complainants, its publishers, with the design and tending to interfere with their business in publishing said paper, and from making any threats or using any intimidation to the dealers or advertisers in such newspaper, tending to cause them to withdraw their business from such newspaper." The grievance against the Times was its refusal to discontinue the use of "plate matter" for its paper (53 N. J. Eq. 106; 30 Atl. 883). Such boycott was held not legalized by the New Jersey act of 1883. See § 65; also *Martin v. McFall*, 65 N. J. Eq. 91; 55 Atl. 465 (1903). So in *Casey v. Cincinnati Typographical Union*, 45 Fed. 135; 12 L. R. A. 193 (C. C. Ohio, 1891), an injunction was granted under similar conditions, the grievance being the refusal of the proprietor to "unionize" his office, that is to

the immediate employer of the boycotting employees, there might

say, publish his paper according to the customs and regulations laid down and prescribed by the union, and pay wages at the rates fixed by it, and discharge all persons not members thereof. In *Matthews v. Shankland*, 25 Misc. 604; 56 N. Y. Suppl. 123 (Supm. Ct., Sp. T., 1898), *Casey v. Cincinnati Typographical Union* was followed on granting an injunction under similar conditions. So in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912; 28 C. C. A. 99 (8th C., 1897), members of labor organizations (lodges of the "Coopers' International Union" and the "Trades Assembly of Kansas City") were enjoined from conspiring to compel a corporation engaged in the manufacture of barrels and casks for packing purposes, to abandon the use of hooping machines, this object to be accomplished by dissuading the customers of the corporation from buying machine-hooped barrels and casks, such customers to be so dissuaded through fear, inspired by concerted action of the two organizations, that the members of all the labor organizations throughout the country, would be induced not to purchase any commodity that might be packed in such machine-hooped barrels or casks. The dissenting opinion of Caldwell, J., though too declamatory in style for a judicial opinion, nevertheless seems to us to furnish by far the better reason, and is rich in suggestion. The court said (83 Fed. 921; 28 C. C. A. 108): "With one exception the members of the combination were not in the employ of the plaintiff company"; and it was also stated that no reduction of

wages had been threatened by the company. To somewhat similar effect, see *Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor*, 156 Fed. 809 (C. C. Mont., 1907). In *Shine v. Fox*, 156 Fed. 357; 86 C. C. A. 311 (8th C., 1907), *Hopkins v. Oxley Stave Co.* was followed as "indistinguishable."

In *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 807 (C. C. Ohio, 1894), the plan of the boycott declared illegal was thus set forth: "Pullman cars are used on a large majority of the railways of the country. The members of the American Railway Union whose duty it was to handle Pullman cars on such railways were to refuse to do so, with the hope that the railway companies, fearing a strike, would decline further to haul them in their trains, and inflict a great pecuniary injury upon the Pullman Company. In case the railway companies failed to yield to the demand, every effort was to be made to tie up and cripple the doing of any business whatever by them, and particular attention was to be directed to the freight traffic, which it was known was their chief source of revenue. . . . It was to be accomplished, not only by the then members of the union, but also by procuring, through persuasion and appeal, all employees not members, either to join the union or to strike without joining, by guaranteeing that, if they would strike, the union would not allow one of its members to return to work until they also were restored." The decision might, it would seem, have been sustained solely on the ground of the illegal-

yet remain the question already considered,⁴⁴ whether what we

ity of inducing employees to quit their employment. See § 65. In this view it was unnecessary to inquire into the *intent* of the act of inducing, which was to induce the employer to refuse to deal with, in other words, to boycott, a third person. If, according to the authorities just considered, the relation of membership in the same labor organization is an insufficient basis for a boycott, *a fortiori* was the boycott illegal in that case, as it was instituted in behalf of persons (employees of the Pullman Palace Car Company) who were not members of the Railway Union. This decision was applied to the same general state of facts in *U. S. v. Cassidy*, 67 Fed. 698, 763 (D. C. Cal., 1895). In *Brace v. Evans*, 3 Ry. & Corp. L. J. 561 (Allegheny Co., Pa., Com. Pl., 1888), was held illegal a boycott instituted by persons not in the plaintiffs' employ, by reason of the failure of the plaintiffs to reinstate certain persons in employment as demanded. The boycott was held not to be legalized by Pennsylvania legislation of 1869, 1872, 1876, except by relieving the persons committing the acts specified, from the penalties of crime.

In *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497; 77 N. W. 13; 42 L. R. A. 407; 74 Am. St. Rep. 421 (1898), was involved the legality of the distribution by members of labor unions, in a controversy with employers, of the following circular: "Boycott J. B. & Son's Feed Mills; To Organized La-

bor and Their Friends: The above firm has broken faith with the representatives of the Trades Council and the Railway Teamsters' Union, by annulling an agreement entered into with the above organizations in July last, that none but union men should be employed by that firm thereafter. They have now discharged their union men, and hired non-union men to take their places. We therefore ask all people who believe in living wages and fair treatment of employees to leave this firm and their product severely alone. Boycott B. & Son. By order of Detroit Trades Council." The court below, while enjoining certain acts by such members of the unions, very properly, in our view, excepted from the operation of the injunction "the peaceable distribution of circulars" (such as described above), "or circulars similar thereto, to customers of said B. & Sons, or to the public in the vicinity, but not in front of the mill or premises of B. & Sons, or inhibiting any peaceful appeal to refrain from their business relations with said B. & Sons." So was excepted "threatening to boycott except by violence, or *boycotting by peaceful means*, or the distribution of said boycott circulars, to said customers or to the public, or threatening to injure, affect or ruin the business of said customers of said B. & Sons or others, by any effort to compel or induce said customers or others to refrain from business relations with said B. & Sons, *which effort shall not be accompanied with*

⁴⁴ See decisions cited in § 62; article in 11 Yale Law Jour. 153

(1901-2) on "Solidarity of Interest as Basis of Legality of Boycotting."

have called the doctrine of "solidarity of interest" would justify a boycott by others not employees of such employer, but engaged in the same general occupation with his employees, or members of the same organization. Thus far it would seem that the judicial mind has not, as a rule, risen to the point of regarding this solidarity of interest as sufficient to justify a boycott by employees. Likewise has been developed a tendency to hold without justification a "secondary," as distinguished from a "primary" boycott, that is, a boycott directed against, not the immediate employer, but a third person, dealing with him. In the view herein taken there is no basis for such a distinction.⁴⁵

§ 64. **Inducing breach of contract.**—In determining the legality of the act of inducing another to break his contract, there has already been indicated, as a test applicable, whether such

violence or threat of violence." But it was held that the decree should be so modified as to include the distribution of circulars by the defendant unions. The boycott was instituted because of the refusal of the plaintiffs, who were employers, to sign a contract regulating the conditions of employment of teamsters. The question whether the relation of the defendants was such as to justify the boycott was not discussed in the opinion, though elaborate in other points.

To somewhat similar effect is *My Maryland Lodge v. Adt*, 100 Md. 238; 59 Atl. 721; 68 L. R. A. 752 (1905), where the injunction against the boycott and incident acts (see § 25) was allowed, notwithstanding that such boycott, as well as the strike to which it was incident, was for the purpose of securing an increase of wages. See

also *National Tel. Co. v. Kent*, 156 Fed. 173 (C. C. W. Va., 1907).

An injunction against a boycott of an employer by employees was also allowed in *Wilson v. Hey*, 232 Ill. 389; 83 N. E. 928; 16 L. R. A. N. S. 85; 122 Am. St. Rep. 119 (1908; see as to effect of putting on "unfair list").

As to relief under Federal anti-trust act against boycott instituted for the purpose of compelling unionization of shops, see § 191. As to boycott being illegal under Ohio anti-trust act, see § 227.

As to proceedings to punish for contempt for violation of injunction against boycott by employees, see § 95.

See, on the general subject, articles in 20 Harv. Law Rev. 253, 345, 428 (1907) by Jeremiah Smith; 42 Am. Law Rev. 200 (1908) by C. R. Darling.

⁴⁵ See *Parkinson v. Building Trades Council*, 98 Pac. 1027, 1038 (Supm. Ct. Cal., 1908), where what

seems to have been a secondary boycott was sustained, but see to the contrary decision cited in § 62.

act was the natural incident or outgrowth of some lawful relation.⁴⁶ On principle the relation of employee would, like that of trade competitor,⁴⁷ seem sufficient for this purpose. But the propriety of the application of this test has yet to obtain general recognition.⁴⁸

⁴⁶ See § 28.

⁴⁷ See § 35.

⁴⁸ In *Temperton v. Russell*, 1 Q. B. D. (1893), 715, the defendants, though not employees, stood in the relation already considered, of members of a labor organization, having a dispute with the plaintiff, thus furnishing an opportunity for raising the question whether the "solidarity of interest" did not furnish a sufficient basis to sustain the legality of the act. But the court paid no attention to the existence of such relation. The action was by a master mason and builder against officers and members of a joint committee of three labor unions (of bricklayers, "builders' laborers" and plasterers, respectively) for inducing persons who had contracted to furnish materials to the plaintiff to break their contracts, and for conspiring to induce them not to enter into contracts with him. The grievance of the unions was that the plaintiff continued to supply building materials to a firm of builders that had refused to obey certain rules laid down by the unions with regard to building operations. Compare, however, *Allen v. Flood*, App. Cas. (1898), 1. The difficulties incident to applying the doctrine without qualification to acts supported by the relation of employee, were appreciated by Smith, J. (in *Temperton v. Russell*), who, in answer to the objection that those inducing a strike would be liable in case of the employees being under con-

tract, said: "The present is a very different case to that suggested, viz., the merely calling out men on strike, though it does appear to me that, if a strike were used for the purpose and with the intent above mentioned, an action would lie." A similar situation was presented in *Parkinson v. Building Trades Council*, 98 Pac. 1027, 1035 (Supm. Ct. Cal., 1908), it being, however, regarded as unnecessary to decide the point. See also *Glamorgan Coal Co. v. South Wales Miners' Federation* (under §§ 28, 67); editorial note in 18 Law Quart. Rev. 1 (1902).

In *Aberthaw Construction Co. v. Cameron*, 194 Mass. 208; 80 N. E. 478; 120 Am. St. Rep. 542 (1907), relief was allowed against a conspiracy to compel the exclusive employment of members of unions, in pursuance of which the conspirators caused a breach of contract between the employer and a third person.

In *Beattie v. Callanan*, 82 App. D. 7; 81 N. Y. Suppl. 413 (1903), a labor union and its members were held liable for inducing breach of a contract by means of causing a strike; this because of refusal to formally recognize the union or for an affront to its walking delegate.

In *Chesapeake & O. Coal Agency Co. v. Fire Creek Coal, etc., Co.*, 119 Fed. 942 (C. C. W. Va., 1902); affirmed in *Carroll v. Chesapeake & O. Coal Agency Co.*, 124 Fed. 305; 61 C. C. A. 49 (4th C., 1903),

§ 65. **Inducing to refuse to continue in employment, i. e., to quit employment.**—In the view already taken there is nothing inherently or necessarily illegal in inducing one person to refuse to deal or continue to deal with another.⁴⁹ On principle it would seem clear that the same doctrine should cover and apply to the case of inducing one person to refuse to continue to deal with another, *as employee with employer*; in other words, to quit his employment. But the accepted doctrine is otherwise, and we find the prevailing rule to be that “any person who knowingly entices away the servant of another, and thereby induces him to violate his contract with his master, or who thereby deprives the master of the services of one then actually in his service, whether under a contract to serve or not,⁵⁰ is liable to the master for his actual loss therefrom.”⁵¹ We understand the origin of this anomalous doctrine on learning that

strikers and members of the organization conducting and controlling the strike were held liable for preventing by intimidation persons from entering the employment of one who was thereby prevented from fulfilling contracts with the plaintiff.

In *Read v. Friendly Society of Operative Stonemasons*, 2 K. B. (1902) 732, it was held actionable for members of a union and its officers to induce the employers of an apprentice to break the contract of apprenticeship, notwithstanding the claim that the employment of the apprentice was in violation of the rules of the union, which rules had been agreed to and signed by the employers. So in *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A. 7th C., 1908), it was held unlawful to induce apprentices or others to break their contracts to serve for definite times.

For a further consideration of the same topic, with special reference to the case of inducing to quit em-

ployment *in violation of a contract to serve*, see § 67.

⁴⁹ See c. IV.

⁵⁰ See § 67.

⁵¹ So stated in *Wood on Master and Servant* (2d ed.), § 230. See by way of illustration, *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48 (C. C. N. Y., 1887); *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903); *Sailors' Union v. Hammond Lumber Co.*, 156 Fed. 450; 85 C. C. A. 16 (9th C., 1907). Another conspicuous instance is *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 816 (C. C. Ohio, 1894), where punishment was allowed for contempt for inducing the employees of a railroad receiver to leave his employ. This on the ground that any unlawful interference with the operation of a road in the hands of a receiver is a contempt, and that, if the receiver had been a private corporation, he could have recovered damages for the injury thus in-

at the time of such origin servants were in effect, if not in a strict legal sense, serfs or slaves, so that an inducement to leave one's employment was not a mere inducement to refuse to continue to deal, but was an interference with a chattel be-

flected on the business of the road. See § 62; *Dixon v. Dixon*, 1 Ch. (1904) 161. Compare, however, *Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co.*, 60 Fed. 803, 823; 25 L. R. A. 414, 429 (C. C. Wis., 1894). See *Wabash R. Co. v. Hannahan*, 121 Fed. 563, 565 (C. C. Mo., 1903). In *Carew v. Rutherford*, 106 Mass. 1, 13; 8 Am. Rep. 287, 294 (1870), an action was sustained for the recovery back of money paid in response to a demand made in pursuance of a conspiracy to induce the employee so paying to quit his employment and deter others from entering it. See *Burke v. Fay*, 128 Mo. App. 690; 107 S. W. 408 (1908).

As to entering upon premises of employer for purpose of so inducing, as constituting trespass, see *Parkinson v. Building Trades Council*, 98 Pac. 1027, 1035 (Supm. Ct. Cal., 1908).

In *Reinecke Coal Mining Co. v. Wood*, 112 Fed. 477 (C. Ct. Ky., 1901), where acts or threatened acts of violence seem a sufficient ground for the relief granted, the decision might, in accordance with this doctrine, have rested on the ground that the acts held illegal included inducing certain employees to join a certain labor organization and thereafter to strike if a certain scale of wages were not adopted by the employers.

As to effect of offering pecuniary inducement to quit or not to enter employment, see *Waddey Co. v. Richmond Typographical Union*, 105

Va. 188; 53 S. E. 273; 5 L. R. A. N. S. 792 (1906); *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*, 66 Atl. 953 (Ct. Ch. N. J., 1907); *Rogers v. Evarts*, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891).

See, on the general subject, articles in 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen; 18 Id. 423 (1905) by E. W. Huffcut; 44 Am. Law Reg. N. S. 465 (1905) by W. D. Lewis.

In several instances a civil or criminal liability, or both, has been declared by statute for so inducing to quit, or, as it is sometimes expressed, "enticing away." See Ala. Crim. Code (1907), § 6849; Ga. Penal Code (1895), §§ 121, 122; *Broughton v. State*, 114 Ga. 34; 39 S. E. 866 (1901); *McAllister v. State*, 122 Ga. 744; 50 S. E. 921 (1905); *Hudgins v. State*, 126 Ga. 639; 50 S. E. 492 (1906); Ill. R. S. (Starr & Curtis' Ed., 1896), c. 9, § 19; La. L. 1906, c. 54; Nev. Comp. Laws (1900), § 624; N. J. G. S. (1895), p. 66, § 6; N. C. Revisal (1905), § 3365; *Haskins v. Royster*, 70 N. C. 601; 16 Am. Rep. 780 (1874); *Sears v. Whitaker*, 136 N. C. 37; 48 S. E. 517 (1904). See also Del. R. S. (1893), c. 79, § 18. So in case of "unlawful doings" causing a person to leave his employment, Ill. R. S. (Starr & Curtis' Ed., 1896), c. 38, § 296. So by Del. R. S. (1893), p. 928; N. J. L. 1903, c. 257, § 63, to, in furtherance of a strike, by offer of recompense, induce an employee of

longing to the employer, being thus tantamount to trespass or larceny.⁵² There is doubtless a growing consciousness in the judicial mind that a doctrine so anomalous, and originating in conceptions of social relations that are utterly repugnant to those now prevailing, is ill adapted to present conditions.⁵³ Even long ago it was settled that an exception should be made of cases of ignorance by the inducing party of the relationship of employee and employer.⁵⁴ But inasmuch as the doctrine is so deeply imbedded in the law, it is better to obtain relief against it by means of legislation,⁵⁵ than by the slow process of judicial modification. The practical mischief produced by

a railroad company to leave his service "while in transit." See also *Me. R. S.* (1903), c. 124, § 9.

Besides are numerous instances of what probably are now obsolete statutory provisions having special reference to "enticing away" apprentices. So in some instances such provisions have had reference to special classes of persons, such as seamen, or immigrants or miners.

For statutes having reference to inducing to quit *in violation of contract to serve*, see § 67.

⁵² It seems clear that the doctrine can be traced to the English Statute of Laborers of the fourteenth century. See the elaborate dissenting opinion of Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 216, 253 (1853); also *Wolf v. New Orleans Tailor-Made Pants Co.*, 113 La. 388; 37 So. 2; 67 L. R. A. 65 (1904); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 559; 69 Atl. 405, 406; 16 L. R. A. N. S. 746, 752 (1908).

⁵³ For instance, in *Rogers v. Evans*, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891), the court questioned the soundness of the doctrine, and refused an injunction against acts within such doctrine,

on the ground that the case was one of doubtful right.

See, however, *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903). In *Waddey Co. v. Richmond Typographical Union*, 105 Va. 188; 53 S. E. 273; 5 L. R. A. N. S. 792 (1906), an injunction was refused against inducing by striking employees to quit or not to enter employment, the means employed not being unlawful. See also *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*, 165 Ind. 421; 75 N. E. 877; 2 L. R. A. N. S. 788 (1905); *Kline v. Eubanks*, 109 La. 242; 33 So. 211 (1902).

⁵⁴ *Clark v. Clark*, 63 N. J. Law, 1; 42 Atl. 770 (1899).

⁵⁵ Thus, by N. J. Revision (1895), p. 2344, § 23, "it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation." To similar effect, *Colo. R. S.* (1908), § 3924. In

allowing this doctrine to stand has already been seen in its extension from the mere relation of employer and employee to the relations of life generally.⁵⁶

§ 66. **Inducing to refuse to enter or re-enter employment.**—

The doctrine that it is unlawful to induce to quit employment seems to have been extended, though it may be with qualification, to the case of inducing to refuse to enter or re-enter employment. What is elsewhere said,⁵⁷ as to who it is to whom the wrongdoer is liable for preventing a person from carrying out his intention to deal with another person applies here. Assuming him to be liable under any conditions to the person induced to refuse to enter the employment,⁵⁸ is he liable to the intended employer? It seems to have been generally as-

Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc., 59 N. J. Eq. 49; 46 Atl. 208 (1899), it was said of the New Jersey act: "The words would seem to intend a legalization of a combination to induce others to join in a strike and are perhaps broad enough to legalize a combination to persuade individual workmen to quit or refuse to enter the service of any person or persons or corporation." In *Frank v. Herold*, 63 N. J. Eq. 443; 52 Atl. 152 (1902), the act was held to "simply render innocent as against the public, an act which previous to its passage, was a misdemeanor, and punishable by indictment," but not to "take away or in anywise affect any private rights which may arise out of acts which are legalized by that legislation." See also, as to such act, *Mayer v. Journeymen Stonecutters' Assoc.*, 47 N. J. Eq. 519, 531; 20 Atl. 492, 496 (1890); *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 119; 30 Atl. 881, 887 (1894); *Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co.*, 60 Fed. 803, 815; 25 L. R. A. 414, 423 (C. C. Wis., 1894).

So by Tex. L. 1899, c. 153, § 2, it is not unlawful "to induce or attempt to induce by peaceable and lawful means, any person to accept any particular employment or quit or relinquish any particular employment in which such person may then be engaged, or to enter any pursuit, or refuse to enter any pursuit or quit or relinquish any pursuit in which such person may then be engaged; provided that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof."

⁵⁶ See § 27.

⁵⁷ See § 74. See, on the general subject, article in 16 Harv. Law Rev. 237 (1902-3) by E. F. McClennen.

⁵⁸ In *Jersey City Printing Co. v. Cassidy*, infra (63 N. J. Eq. 764; 53 Atl. 233), it was suggested that "the molested workman, seeking employment and unreasonably interfered with in this effort by a combination" has a remedy by action for damages or by injunction.

sumed that he is,⁵⁹ but without reference to the theoretical objection to sustaining a liability in favor of one person merely because another has failed to carry out his intention to deal with him. Such liability has been sought to be based on what has been termed a "probable expectancy," that is, a "right to enjoy a certain free and natural condition of the labor market."⁶⁰ But merely inducing to refuse to enter or re-enter the

⁵⁹ See *Walker v. Cronin*, 107 Mass. 555, 562 (1871); *Vegelahn v. Guntner*, 167 Mass. 92; 44 N. E. 1077; 35 L. R. A. 722; 57 Am. St. Rep. 443 (1896). In *State v. Stewart*, 59 Vt. 273, 291; 9 Atl. 559, 569; 59 Am. Rep. 710, 717 (1887), though a criminal proceeding, it was held not necessary to aver that the employer desired or intended to employ a person induced not to enter his employment; an allegation that such employer was in fact prevented from employing him being held, *ex vi termini*, to imply a purpose to employ him, which had been met and thwarted; there being also an allegation that the defendants conspired to hinder and prevent such employment. In *People v. Barondess*, 133 N. Y. 649; 31 N. E. 240 (1892); adopting opinion of Daniels, J., in 61 Hun, 571, 581; 16 N. Y. Suppl. 436, 441 (1891), it was held a "threat to do an unlawful injury to property," to "threaten" to prevent persons who had been on strike from returning to their employment. What the defendant actually told the employer was that he would have to pay him a certain sum "to have his people back again to work"; that if he did not pay it "he could not have his people back again to work." This was a decision by four judges against three, reversing a decision made by two judges against one.

The dissenting opinion of Gray, J., reported in 45 N. Y. State Reporter, 248, furnishes the better reason.

People v. Barondess was followed under like conditions in *People v. Weinseimer*, 117 App. D. 603; 102 N. Y. Suppl. 579 (1907); affirmed in 190 N. Y. 537; 83 N. E. 1129 (1907). See also *State v. Dalton*, 114 S. W. 1132 (Ct. App. Mo., 1908; for facts, see § 14).

As to liability under English statute for "watching or besetting," for purpose of inducing to refuse to enter employment, see §§ 86, 87.

⁶⁰ *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 765; 53 Atl. 230, 233 (1902), where it was said: "The peculiar element of this perhaps newly recognized right, is that it is an interest which one man has in the freedom of another. . . . It will probably be found in the end that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity, and protected by substantially the same rules."

This language was approvingly quoted in *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 110, 117; 85 N. E. 897, 900 (1908), where was asserted "the common law right to a reasonably free labor market." It was further said in

employment of a person seems regarded as producing no liability in his favor. While it is said that "the flow of labor to the employer cannot be obstructed by intimidation or coercion produced by means of injury to person or property, or by threats of such injury,"⁶¹ it is also said: "The right of an employer to free labor is subject to the right of the laborer to hamper him by many expedients short of fraud or intimidation amounting to injury to the person or property of those who desire to enter his employ, or threats of such injury. For instance, persuasion not amounting to such intimidation is lawful, and perhaps the same may be said of social pressure, even when carried to the extent of social ostracism, not including, however, any threat in a business point of view."⁶² The law on this subject must, however, be regarded as still somewhat unsettled.⁶³

§ 67. Inducing to quit employment in violation of contract

Jersey City Printing Co. v. Cassidy, supra: "What is the measure or test by which the conduct of a combination of persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market and as such injurious to an employer of labor in respect of his 'probable expectancies' has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our law during the last fifty years—the reasonably prudent, reasonably courageous and not unreasonably sensitive man." The liability arises in case of interference with the enjoyment of such expectancy "by means of such molestation or personal annoyance as would be liable to coerce the person

upon whom it was inflicted, assuming that he is reasonably courageous and not unreasonably sensitive to refrain from employing or being employed." It was here regarded as unnecessary to determine how far the element of combination is a necessary condition of liability. See also § 74.

⁶¹ *L. D. Willcut & Sons Co. v. Driscoll*, supra (200 Mass. 120; 85 N. E. 902). The principle was here applied to "the coercion and intimidation exerted by labor unions upon their members by fines or threats of fines" (200 Mass. 126; 85 N. E. 904). For facts, see § 6. As to picketing, see § 86.

⁶² *Id.* (200 Mass. 119; 85 N. E. 901). As to picketing, see § 87.

⁶³ Being "still in the nebulous but clearing stage," *Id.* (200 Mass. 116; 85 N. E. 900). See discussion in *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A., 7th C., 1908; see § 68).

to serve.—As already noted, the doctrine that it is unlawful to induce to quit employment applies even in the absence of any contract to serve for any fixed period.⁶⁴ *A fortiori* does it apply to inducing to quit employment in violation of a contract to serve for a fixed period.⁶⁵

⁶⁴ See § 65; *Frank v. Herold*, 63 N. J. Eq. 443; 52 Atl. 152 (1902); *Johnston Harvester Co. v. Meinhardt*, 60 How. Pr. (N. Y.) 168, 172 (Supm. Ct., Sp. T., 1880). Liability for so inducing was sustained in *Thacker Coal Co. v. Burke*, 59 W. Va. 253; 53 S. E. 161; 5 L. R. A. N. S. 1091 (1906), sustaining on demurrer, declaration alleging intent to injure, and that the acts complained of were done "maliciously, without justifiable cause." See as to effect of Code (1906), § 413. See also *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811, 828 (C. C. Ohio, 1897); *Quinn v. Leathem*, App. Cas. (1901) 495.

⁶⁵ In *South Wales Miners' Federation v. Glamorgan Coal Co.*, App. Cas. (1905) 239; affirming *Glamorgan Coal Co. v. South Wales Miners' Federation*, 2 K. B. (1903) 545, which reversed 1 K. B. (1903) 118, it was inducing employees "to break their contracts of service" that was held illegal. For facts, see § 68.

In *Smithies v. National Assoc. of Operative Plasterers*, 1 K. B. D. (1909) 310, an agreement having been made between a union and a federation of employers for the reference of disputes to arbitration, and a dispute having arisen between a member of the federation and his employees, it was held no justification for such union inducing breach by such employees of their contracts of employment, that there was a bona fide belief on the part

of the union that the employers were intending to evade a settlement of the dispute in accordance with the agreement, or even that such was actually their intent.

By § 3 of the Trade Disputes Act of 1906, "an act done by a person in contemplation or furtherance of a trade dispute, shall not be actionable on the ground only that it induces some other person to break a contract of employment." See article in 42 Am. Law Rev. 200 (1908) by C. R. Darling.

In *Walker v. Cronin*, 107 Mass. 555, 567 (1871), a cause of action was held stated in a declaration setting forth contracts of the plaintiffs with their workmen for the performance of certain work in the manufacture of boots and shoes; and alleging that the defendant, "well knowing thereof, with the unlawful purpose of hindering and preventing the plaintiffs from carrying on their business, induced said persons to refuse and neglect to perform their contracts, whereby the plaintiffs suffered great damage in their business."

In *Barnes v. Berry*, 156 Fed. 72 (C. C. Ohio, 1907), an injunction was allowed against officers of a labor union inducing members to strike for the purpose of violating their contract with their employers by demanding a modification thereof by way of recognition of the "closed shop."

Barnes v. Berry was distinguished in *Delaware, L. & W. R. Co. v.*

§ 68. **Relation of employee as justifying inducing to quit employment.**—There is, perhaps, a tendency at least to make the legality of inducing to quit employment depend on whether the

Switchmen's Union, 158 Fed. 541 (C. C. N. Y., 1907), where, in an action against a labor union and a subordinate lodge thereof (also their presidents) there was refused an injunction against inducing breach of a contract of service. The members of the union in the employ of the complainant had voted in favor of a strike, but, under the rules thereof, the sanction of the president was required to effectuate the strike. "The consent of the president in connection with the asserted direction by him to take the poll" was held not to be "such an incitement or inducement to strike as to justify a continuance of the injunction," it being said that he "acting under the constitution and by-laws of the union, could, at the request of the members, advise the employees as to their proper and lawful action."

See *Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assoc.*, App. Cas. (1906) 384; *Wabash R. Co. v. Hannahan*, 121 Fed. 563, 564, 565 (C. C. Mo., 1903); *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509; 50 S. E. 353; 69 L. R. A. 90; 106 Am. St. Rep. 137 (1905); *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 763; 53 Atl. 230, 232 (1902); *Krug Furniture Co. v. Berlin Union*, 5 Ont. Law Rep. 463 (1903).

In several instances a civil or criminal liability, or both, has been declared by statute, for, as it has frequently been expressed, "enticing away a servant under contract." See *Ala. Crim. Code* (1907), § 6850;

Streater v. State, 137 Ala. 93; 34 So. 395 (1903); *Ark. Dig.* (1904), § 5030, amended by L. 1905, c. 298; *Sunnyside Co. v. Read*, 71 Ark. 59; 70 S. W. 462 (1902); *Sturdivant v. Tollette*, 84 Ark. 412; 105 S. W. 1037 (1907); *Tucker v. State*, 111 S. W. 275 (Supm. Ct. Ark., 1908); *Cal. Penal Code*, § 646; *Fla. R. S.* (1906), § 3232; *Ga. Penal Code* (1895), § 121; L. 1901, p. 63; L. 1903, p. 91; *Caldwell v. O'Neal*, 117 Ga. 775; 45 S. E. 41 (1903); *Chambless v. Melton*, 127 Ga. 414; 56 S. E. 414 (1907); *McBride v. O'Neal*, 128 Ga. 473; 57 S. E. 789 (1907); *Bright v. State*, 61 S. E. 289 (Ct. App. Ga., 1908); *Ky. Stat.* (1903), § 1349; *Bourlier v. Macaulley*, 91 Ky. 135; 15 S. W. 60; 11 L. R. A. 550; 34 Am. St. Rep. 171 (1891); *La. R. S.* (Wolff's Ed., 1904), p. 993; *Kline v. Eubanks*, 109 La. 242; 33 So. 211 (1902); *Wolf v. New Orleans Tailor-Made Pants Co.*, 113 La. 388; 37 So. 2; 67 L. R. A. 65 (1904); *Miss. Code* (1906), § 1146; *Triplett v. State*, 80 Miss. 379; 31 So. 743 (1902); *State v. Richardson*, 86 Miss. 439; 38 So. 497 (1905); *Gregory v. State*, 42 So. 168 (Supm. Ct. Miss., 1906); *Alford v. Pegues*, 46 So. 76 (Supm. Ct. Miss., 1908); *Mont. Rev. Codes* (1907), § 8827; *N. C. Revisal* (1905), § 3374; *S. C. Crim. Code* (1902), § 359; *State v. Aye*, 63 S. C. 458; 41 S. E. 519 (1902); *State v. Rhody*, 67 S. C. 287; 45 S. E. 205 (1903); *Tenn. Code* (1896), §§ 4337, 4338; *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49, 55 (C. C. Tenn., 1901; held un-

act of inducing was a natural incident or outgrowth of some lawful relation, particularly that of employee.⁶⁶

§ 69. **Combination to induce to quit employment.**—If the act of inducing to quit employment be unlawful, it would seem

lawful for a labor union or its members to attempt to induce apprentices under contract to leave their service).

In *Flaccus v. Smith*, 199 Pa. St. 128; 48 Atl. 894; 54 L. R. A. 640; 85 Am. St. Rep. 779 (1901), it was held actionable to induce employees to violate their agreement with their employer not to belong to a labor union.

⁶⁶ Thus, in *Rogers v. Evarts*, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891), it was held lawful for striking workmen to induce others to leave their employment by "persuasion and entreaty," the court saying that their action was "for an advantage in their business, which they had the right to seek by all lawful means."

So in *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A., 7th C., 1908), in denying relief against mere persuasion to quit or decline employment, while the employer was said to have "the right to a free access to the labor market, and the further right to the continuing services of those who accepted employment at will until such services were terminated by the free act of one or the other party to the employment," the employees were said to have the right "to an equally free access to the labor market." "The right of the one to persuade (but not coerce) the unemployed to accept certain terms, is limited and conditioned by the right of the other to dissuade (but not restrain) them

from accepting." See previous decision in *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 172, 179 (C. C. Wis., 1906). To the contrary, however, seems *Knudsen v. Benn*, 123 Fed. 636 (C. C. Minn., 1903).

So in *Iron Molders' Union v. Allis-Chalmers Co.*, supra, the employer having sent material on which the strikers had been working, to other employers for completion, relief was denied against the action of such strikers in inducing the employees of such other employers to refuse to work on such material, they notifying such employers that they would have to cancel their contracts for the performance of such work, or they would quit work. The court said: "To whatever extent employers may lawfully combine and co-operate to control the supply and the conditions of work to be done, to the same extent should be recognized the right of workmen to combine and co-operate to control the supply and the conditions of the labor that is necessary to the doing of the work."

As to whether action of employee in inducing to quit employment may be regarded as that of a competitor with the employer, see § 45.

In *Reynolds v. Davis*, 198 Mass. 294; 84 N. E. 457; 17 L. R. A. N. S. 162 (1908), it was said to be "settled in this Commonwealth, at least, that competition and similar defenses are not justification for inducing an employee or other person to commit a breach of a contract,

immaterial whether done in pursuance of a combination to do such act. In this view proof of the combination is superfluous so far as the mere question of civil liability is concerned.⁶⁷

and thereby interfering with the business of the employer."

In *South Wales Miners' Federation v. Glamorgan Coal Co.*, App. Cas. (1905) 239; affirming *Glamorgan Coal Co. v. South Wales Miners' Federation*, 2 K. B. (1903) 545, which reversed 1 K. B. (1903) 118, in holding a labor union liable for inducing the breach by employees of their contract of service, it was held no defense that such action was dictated by an honest desire to forward the interest of both employers and employees, and not prompted by a wish to injure the employers, between whom and the employees there was no quarrel or ill-will.

In *Coons v. Chrystie*, 24 Misc. 296; 53 N. Y. Suppl. 668 (Supm. Ct., Sp. T., 1898), an organization of master plumbers and its officers were enjoined from calling out the plaintiff's employees on the ground that he was not a member of the organization. It was so held against the contention that "the workmen had agreed with the defendant society that they should not accept employment from unaffiliated persons, such as the plaintiff," and that "by causing them to cease work the defendants merely caused the workmen to keep their promise," the court saying: "It may be that such an agreement would be valid as between the society and its members." Compare *Reform Club of Masons, etc., v. Laborers' Union Protective Soc.*, 29 Misc. 247; 60 N. Y. Suppl. 388 (Supm. Ct., Sp. T., 1899).

In *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903), while conceding the possibility that it may now be legal to induce another to quit his employment as a means of advancing or maintaining the rate of one's own wages, it was denied to be thus legal merely for the purpose of obtaining the exclusive employment of members of labor unions.

As to relation of employer as justifying inducing to quit employment, see § 36. Compare as to inducing to discharge from employment, § 72.

In *Gray v. Building Trades Council*, 91 Minn. 171, 185; 97 N. W. 663, 668; 63 L. R. A. 753, 760; 103 Am. St. Rep. 477 (1903), where an injunction was allowed to employers against a boycott instituted by an association composed of delegates from different labor unions, for the purpose of compelling the employment of union labor only (see § 63), it was held improper to also enjoin from going upon premises where the plaintiffs were employed, "for the purpose of ordering, directing or notifying men belonging to the various allied unions to desist from work upon the premises by reason of the fact that plaintiffs were employed thereon." See *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 172 (C. C. Wis., 1906).

⁶⁷ In *Webber v. Barry*, 66 Mich. 127; 33 N. W. 289; 11 Am. St. Rep. 466 (1887), it was held a trespass to enter with a body of

§ 70. **Criminal liability for combination to induce to quit employment.**—Though mere inducing to quit employment seems of itself to create no criminal liability,⁶⁸ yet, in accordance with the general doctrine of conspiracy to do a merely *unlawful* act not criminal,⁶⁹ conspiracies to induce employees to quit their employment have been held to create a criminal liability.⁷⁰

§ 71. **Inducing discharge from employment.**—The doctrine that it is illegal to induce to quit employment has been conversely applied, so as to create a liability for inducing an employer to refuse to continue to deal with an employee; in other words, to discharge him from employment.⁷¹ Here, too, the

men upon the premises of an employer, with the purpose of inciting his employees to strike.

⁶⁸ See Wood on Master and Servant (2d ed.), § 239.

⁶⁹ See § 13.

⁷⁰ Reg. v. Duffield, 5 Cox. C. C. 404 (1851); State v. Stewart, 59 Vt. 273; 9 Atl. 559; 59 Am. Rep. 710 (1887); State v. Dalton, 114 S. W. 1132 (Ct. App. Mo., 1908; for facts, see § 14).

⁷¹ Thus in Wyeman v. Deady, 79 Conn. 414; 65 Atl. 129; 118 Am. St. Rep. 152 (1906), where there was an accompaniment of threats, it being held unnecessary "to prove any other malice than that which the law might imply from the unlawful act proved."

So in Hollenbeck v. Ristine, 105 Iowa, 488; 75 N. W. 355; 67 Am. St. Rep. 306 (1898); 114 Iowa, 358; 86 N. W. 377 (1901), where, however, the discharge was induced by a libelous statement. The libel, rather than the inducing, seems to have been the gist of the action. So in Lucke v. Clothing Cutters', etc., Assembly, 77 Md. 396; 26 Atl. 505; 19 L. R. A. 408; 39 Am. St. Rep. 421 (1893), of the notification to

an employer by a labor union that in case of his retention in his employ of the plaintiff, a "customs cutter," all labor organizations in the city would be notified that his house was a non-union house. So in Moran v. Dunphy, 177 Mass. 485; 59 N. E. 125; 52 L. R. A. 115; 83 Am. St. Rep. 289 (1901), where the inducement was "with intent to injure" the employee, it being regarded as immaterial whether the result was accomplished "by malevolent advice" or "by falsehood or putting in fear." See May v. Wood, 172 Mass. 11; 51 N. E. 191 (1898). Contrary to the authorities generally on this point, seems Bonsall v. Reagan, 7 Del. (Pa.) Co. Rep. 545 (1900). That it is not necessary, for the purpose of creating liability for inducing such discharge, that a *combination* exist for that purpose, see remarks of Romer, J., in Giblan v. National Amalgamated Labourers' Union, 2 K. B. D. (1903) 600. In Hines v. Whitehead, 124 Iowa, 262; 99 N. W. 1064 (1904), however, it was regarded as necessary under the pleadings to prove a conspiracy to induce such discharge. See also as to liability

doctrine applies even in the absence of any contract to serve for a fixed period.⁷² And here, too, there is, perhaps, a tendency, at least, to make the legality of inducing discharge from employment depend on whether the act of inducing was a natural incident or outgrowth of some lawful relation, particularly that of employee.⁷³

for procuring discharge from employment, *Suarez v. McFall*, 87 S. W. 744 (Tex. Civ. App., 1905).

In an action for causing discharge from employment, recovery was allowed for the amount of wages that the plaintiff would have earned during the period that he was deprived of employment, and he was held not obliged to seek employment elsewhere. *Connell v. Stalker*, 20 Misc. 423; 45 N. Y. Suppl. 1048 (N. Y. City Ct., 1897); affirmed in 21 Misc. 609; 48 N. Y. Suppl. 77 (1897).

By Fla. R. S. (1906), § 3515, it is a crime to conspire to prevent the employment or cause the discharge of a person; or to threaten injury to "life, property or business" for such purpose. In *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969; 43 So. 590 (1907), it was said that such provision should be read in the light of *Chipley v. Atkinson*, *infra*.

⁷² *Chipley v. Atkinson*, 23 Fla. 206; 1 So. 934; 11 Am. St. Rep. 367 (1887); *Gibson v. Fidelity & Casualty Co.*, 232 Ill. 49; 83 N. E. 539 (1907); *Lucke v. Clothing Cutters', etc., Assembly*, *supra*; *Berry v. Donovan*, 188 Mass. 353, 360; 74 N. E. 603, 606; 5 L. R. A. N. S. 899, 904; 108 Am. St. Rep. 499 (1905); *Carter v. Oster*, 112 S. W. 995 (Ct. App. Mo., 1908); *Dannerberg v. Ashley*, 10 Ohio C. Ct. 558 (1894). So in *London Guar-*

antee & Accident Co. v. Horn, 206 Ill. 493; 69 N. E. 526; 99 Am. St. Rep. 185 (1904), as to a contract characterized as one "terminable at will, but under which the employment would have continued indefinitely in accordance with the desire of the employer, except for such interference." So in *Perkins v. Pendleton*, 90 Me. 166; 38 Atl. 96; 60 Am. St. Rep. 252 (1897), where there was an accompaniment of threats, etc., as to which, see § 6. So in *Connell v. Stalker*, *supra*, where it does not appear that there was such a contract.

To the contrary, however, see *Holder v. Manuf. Co.*, 138 N. C. 308; 50 S. E. 681 (1905), with which compare previous decisions in 135 N. C. 392; 47 S. E. 481 (1904). See *Chipley v. Atkinson*; *Lucke v. Clothing Cutters', etc., Assembly*, *supra*, to the effect that if the plaintiff alleges employment for a fixed period he must prove the allegation.

As to necessity of alleging and proving defendants' knowledge of contract, see *McGurk v. Cronenwett*, 199 Mass. 457; 85 N. E. 576 (1908).

⁷³ Compare as to inducing to quit employment, § 68. Such relation need not necessarily be that of employee, as to which see § 72. Thus the relation of *party to a contract* seems to have been held sufficient in *Raycroft v. Tayntor*, 68 Vt. 219;

§ 72. **Relation of employee as justifying inducing discharge from employment.**—There is observable a tendency to regard the act of inducing discharge from employment as lawful if merely incident to obtaining employment for one's self,⁷⁴ or it may be for others in "solidarity of interest."⁷⁵ But there is likewise observable a tendency to regard such act as unlawful if merely incident to an end only remotely connected with obtaining employment for one's self, or like advantage. The question has been specially discussed in the common case of procuring the discharge of the employee merely because of his refusal to become a member of a labor union. The decided weight of authority is to the effect that under these conditions the act is unlawful, as without sufficient justification.⁷⁶ Closely akin to the question whether the act of inducing is thus justified, is

35 Atl. 53; 33 L. R. A. 225; 54 Am. St. Rep. 882 (1896), holding that no action would lie for causing the discharge of an employee, by threatening the employer to terminate a contract that the defendant had the right to terminate at any time.

In *Lancaster v. Hamburger*, 70 Ohio St. 156; 71 N. E. 289; 65 L. R. A. 856 (1904), a street railway conductor, discharged as the result of a report of his misconduct made to the company by a patron, was held to have no cause of action against the latter, irrespective of his motive in making such report.

⁷⁴ Thus in *Berry v. Donovan*, *infra* (188 Mass. 357; 74 N. E. 605; 5 L. R. A. N. S. 903), it was conceded that a person seeking employment for himself would be justified "in making an offer to serve on such terms as would result, and as he knew would result in the discharge of the plaintiff by his employer, to make a place for the new-comer. Such an offer for such a purpose would be unobjectionable. It would be merely the exercise of

a personal right, equal in importance to the plaintiff's right."

⁷⁵ See § 46. In *Chipley v. Atkinson*, 23 Fla. 206; 1 So. 934; 11 Am. St. Rep. 367 (1887), it does not clearly appear what the relation of the defendant to the matter was. This is distinguishable from *Lucke v. Clothing Cutters', etc., Assembly*, 77 Md. 396; 26 Atl. 505; 19 L. R. A. 408; 39 Am. St. Rep. 421 (1893), (which followed *Chipley v. Atkinson*), where the defendants were a labor union composed of persons engaged in the same line of occupation as the plaintiff. The question might have been raised whether, assuming the absence of coercion, the similarity or solidarity of interest did not furnish a sufficient basis for the legality of the action.

⁷⁶ So held in *Berry v. Donovan*, 188 Mass. 353; 74 N. E. 603; 5 L. R. A. N. S. 899; 108 Am. St. Rep. 499 (1905), where was sustained an action against a representative and member of a national organization of shoe workers for procuring the

the question already considered at length, whether a strike

discharge of a person employed as shoemaker. The act was regarded as unjustifiable, whether regarded as an incident of competition among employees or of competition between employers and employees. The court said: "The gain which a labor union may expect to derive from inducing others to join it is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it." The illegality of such act seems also (as in *Curran v. Galen*, *infra*) to have been based on a distinct objection, namely, the tendency to produce an illegal monopoly. See § 54. See discussion of *Berry v. Donovan* with other decisions in article in 42 *Am. Law Rev.* 706 (1908) by A. M. Brown. To similar effect with *Berry v. Donovan* is *Curran v. Galen*, 152 *N. Y.* 33; 46 *N. E.* 297; 37 *L. R. A.* 802; 57 *Am. St. Rep.* 496 (1897), where an action was sustained against members of a labor union, for conspiring to injure the plaintiff by taking away his means of earning a livelihood, and preventing him from obtaining employment, by threatening to procure his discharge, and prevent him from obtaining employment elsewhere, unless he joined the union. Compare *People ex rel. Gill v. Smith*, 5 *N. Y. Crim. R.* 509 (*N. Y. Co. Oyer & Terminer*, 1887), and *N. Y. Penal Code*, § 168, subd. 5, forbidding the use of

force, threats or intimidation "to prevent another from exercising a lawful trade or calling." As admitted by the demurrer, there was (in *Curran v. Galen*) no "intent or purpose to injure plaintiff in any way," nor does it appear that, otherwise than as above stated, any unlawful means were employed to effect the object. Though not so distinctly stated, the existence of the *combination* seems to have largely influenced the decision. It was also intimated that there was a violation of the constitutional guaranty of the right freely to pursue a lawful avocation and of freedom in the pursuit of happiness. See also *Consolidated Steel & Wire Co. v. Murray*, 80 *Fed.* 811, 823 (*C. C. Ohio*, 1897). See *Curran v. Galen* distinguished in *National Protective Assoc. v. Cumming*, 170 *N. Y.* 315; 63 *N. E.* 369; 58 *L. R. A.* 135; 88 *Am. St. Rep.* 648 (1902), with which it seems difficult to reconcile it. See § 60.

In *London Guarantee & Accident Co. v. Horn*, 206 *Ill.* 493; 69 *N. E.* 526; 99 *Am. St. Rep.* 185 (1903), where it seems clearly recognized that the existence of the relation of trade competitor would have justified inducing the discharge from employment there under consideration, such relation was held not to exist, and such inducing was consequently held actionable, where it was the act of a person whose motive was to compel the employee to surrender an alleged cause of action, for the satisfaction of which in whole or in part, such party was liable, that is, by virtue of its agreement to indemnify the employer against loss from injury to

otherwise legal is illegal if with intent to induce discharge from employment.⁷⁷

its employees. Such right of action did not depend upon, and was not connected with the continuance of such employment. The court distinguished decisions sustaining the legality of such act of inducing, as "cases where the party who secured the discharge of the employee was in some way in competition with that employee in the business or work in which the employee was then engaged, or was a member of some organization which was in competition with the employee or some organization to which that employee belonged."

In *Giblan v. National Amalgamated Labourers' Union*, 2 K. B. D. (1903) 600, it was held an insufficient justification (see § 60) that the labor union and officers thereof inducing such discharge, desired to compel the discharged employee to pay the arrears of his defalcation as a former member of the union. It was here said by *Romer, J.*, that "considerable difficulty may often arise in particular cases in ascertaining what is a justification"; that "regard must be had to the circumstances of each case as it arises, and it is not practically feasible to give an exhaustive definition of the word to cover all cases." It was also said: "I do not think any excessive practical difficulty would arise in directing a jury on the point in any particular case." But here the learned justice seems to have fallen into the same error as did *Lord Esher* in *Flood v. Jackson*, Q. B. (1895) 21, an error that was corrected on ap-

peal in *Allen v. Flood*, App. Cas. (1898) 1, 118; see § 11; note in 20 Law Quart. Rev. 2 (1904).

As to effect of Trade Disputes Act of 1906, see *Conway v. Wade*, 2 Q. B. D. 844 (1908).

Giblan v. National Amalgamated Labourers' Union was followed in *Brennan v. United Hatters of North America*, 73 N. J. Law, 729; 65 Atl. 165; 9 L. R. A. N. S. 254; 118 Am. St. Rep. 727 (1906), in sustaining an action against a labor union and members thereof, by a member thereof, for acts "the natural and proximate result" of which "intended and designed by the defendants to ensue, was to interfere with the plaintiff's continued employment in the factory" where he was employed, he being discharged from employment therein, though afterward re-employed. The acts in question included the unwarranted conviction of the plaintiff by the vigilance committee of the union, a sentence that he pay a money fine and give up for one year his position as foreman in the factory, the ratification of this conviction and sentence by the union, and the consequent withdrawal of his membership card from the steward at the factory.

In *State v. Van Pelt*, 136 N. C. 633; 49 S. E. 177; 68 L. R. A. 760 (1904), on an indictment for conspiracy to injure business, held not the use of unlawful means for three persons to go to an employer's place of business and notify him that he could not be considered in sympathy with organized labor unless he

⁷⁷ See § 60.

kept constantly employed union men; or if he kept in his employment non-union men with whom he had a contract of employment; nor, on his refusal to comply, to pub-

lish a notice to the effect that he had been "declared unfair and so listed, and that no union carpenters would work any material from his shop" after a certain date.

CHAPTER X

ACTS OF VIOLENCE OR PRODUCING FEAR OF VIOLENCE

- § 73. Boycott or refusal to deal, as distinguished from incident illegal acts.
- 74. Acts of violence, as incident to boycott, etc.
- 75. Acts producing fear of violence, as incident to boycott, etc.
- 76. Threat or announcement of intention, as incident to boycott, etc.
- 77. Threat or announcement of intention to boycott.
- 78. Strike as distinguished from incident acts of violence or acts producing fear of violence.
- 79. Acts of violence as incident to strike.
- 80. Acts producing fear of violence, as incident to strike.
- 81. Threat or announcement of intention, as incident to strike.
- 82. Strike as induced by acts of violence or acts producing fear of violence, or by announcement of intention to do lawful act.
- 83. Threat or announcement of intention to strike.
- 84. Definition of picketing.
- 85. Picketing whether illegal.
- 86. Picketing accompanied with acts of violence or producing fear of violence.
- 87. Picketing accompanied with inducing to refuse to enter or continue in employment.

§ 73. **Boycott or refusal to deal, as distinguished from incident illegal acts.**—It has already been suggested that while there appears to be nothing illegal in a boycott apart from acts of violence or producing fear of violence, there has come to rather extensively prevail a contrary doctrine, namely, that a boycott is inherently illegal apart from such acts.¹ It has also been sug-

¹ Thus, as elsewhere seen, injunctions have been allowed against boycotts, whereas they should have been allowed only against the illegal acts incident to the boycotts.

The distinction between a boycott and an illegal act merely incident thereto is well illustrated in

Foster v. Retail Clerks' Protective Assoc., 39 Misc. 48, 59; 78 N. Y. Suppl. 860, 868 (Supm. Ct., Sp. T., 1902), where, though there was held to be no illegality in combining with others, peaceably, by persuasion only, to induce persons upon the street to refuse to deal with the plaintiffs,

gested that such doctrine is referable not so much to the view that a boycott, as already defined, is illegal, as to the view that it is inseparably connected with acts that are indisputably illegal. And this view is doubtless referable to the circumstance that those engaged in a boycott, as already defined, have so frequently committed such acts by way of incident to the boycott. If, however, a boycott, as already defined, is illegal, *a fortiori* is it illegal if such acts are incident thereto. It is here proposed to consider the legality of such acts regarded so far as possible, as apart from the boycott. The absence of necessary connection between the boycott and such incident acts may easily be shown by illustration. An employee, being engaged in a controversy with his employer, seeks to induce a third person to refuse to deal or to continue to deal with such employer. Such third person, however, persists in dealing with the employer, and after an interval, the employee, either with the same motive to induce such person to refuse to deal or to continue to deal, or from the motive of pure revenge, commits a physical assault upon such person or destroys his property. This act is, as we assume, illegal as contrary to the civil or criminal law, or both; but it is or should be clear, that the illegality of such acts in no way makes illegal the previous legal act of seeking to induce to refuse to deal or to continue to deal, any more than the previous legal act of seeking to induce to refuse to deal or to continue to deal makes legal the illegal act of assault or destruction of property. Leaving, then, out of consideration, for the present, the question of the legality of the act of inducing to refuse to deal or to continue to deal, whatever the intent of such act, or whether done by single individuals or by combinations of individuals, we confine our attention

an injunction was allowed against entering upon their premises for the purpose of interfering with or interrupting their trade or customers, or against, while thereon, so interfering or interrupting; against obstructing access to the plaintiff's

store by any physical means; so acting as to collect crowds in front of or adjacent to the store; obstructing travel on the streets or sidewalks at or in the neighborhood thereof.

to acts that, though as to conditions of time and place accompanying boycotts, are, in a legal sense, absolutely disconnected from them.

§ 74. **Acts of violence, as incident to boycott, etc.**—What has already been said as to liability for acts of direct violence to person or tangible property will apply to such acts when incident to a boycott or refusal to deal, namely, that they are universally regarded as creating a civil or criminal liability or both. Assuming, as we must, that such an act of violence, preventing a person from carrying out his intention to deal with another person, creates a civil liability, to whom is the wrongdoer liable? Clearly he is to the party injured in person or property; but is he also liable to the person with whom the injured party intended to deal? It seems to have been generally assumed, though without consideration, that he is,² notwithstanding that, as already seen, there is, generally speaking, no liability for merely inducing refusal to deal. If we assume that an injury to business has no independent existence, as distinct from an injury to person or property, there would seem to be, on principle, serious objection to sustaining in such case a liability in favor of one person, merely because another person failed, even though as a result of violence, to carry out his intention to deal with him. There may be plausibility, at least, however, in the suggestion that such liability has its basis

² See § 66. Even in *Allen v. Flood*, App. Cas. (1898), 1, where the unsoundness of the doctrine of independent injury to business, was so learnedly and, in our view, so unanswerably shown, the court were clearly of the view that a liability exists in the case supposed. Thus, Lord Herschell recognized the authority of *Tarleton v. McGawley*, Peake N. P. 205 (1793), where intending customers were frightened away by an act of violence resulting in the death of one of them, and the party with whom they intended to deal was held to have a

right of action. See also remarks of Lord Davey (p. 173). But assuming the absence of injury or *fear of injury* to the person or property of such person, and assuming, according to the doctrine of *Allen v. Flood*, that there is no injury to business that the law recognizes as distinct from injury to person or property, what difference does it make—so far as concerns the rights of the person with whom the party actually injured in person or property intended to deal—whether the intention was frustrated by violence or by mere change of intention?

in "the right to a free market,"³ said to be "the right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not as they may voluntarily elect."⁴ In this view "the tort exhibited by the violation of the right to a free market consists in coercing the market, i. e., interfering with the right of a particular dealer to enjoy the advantages of freedom to deal with him on the part of all who may voluntarily desire to deal with him."⁵

§ 75. **Acts producing fear of violence, as incident to boycott, etc.**—What has already been said as to liability for acts producing fear of violence will apply to such acts when incident to a boycott.⁶

³ *Booth v. Burgess*, 65 Atl. 226, 229 (Ct. Ch. N. J., 1906); *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 110, 121; 85 N. E. 897, 902 (1908). Or such right may perhaps be properly characterized as one to *unobstructed access* to the place where he transacts business. See *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 Fed. 608 (C. C. Ohio, 1898); *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 764; 53 Atl. 230, 233 (1902). See § 66; discussion in 21 *Am. Law Rev.* 510, 520 (1887) by J. H. Wigmore; article in 16 *Harv. Law Rev.* 236 (1902-3) by E. F. McClennen.

⁴ *Booth v. Burgess*, *supra*, the decision in which was based on such right, it being regarded as unnecessary to resort to the theory of a civil liability for an act otherwise unlawful, but done in pursuance of a combination to do such act. Here was allowed against officers and agents of labor organizations on behalf of an employer, an injunction against "calling out or directing to strike, any employee or employees of the complainant's customers or

persons who were willing to deal with the complainant, with the intent or with the effect to coerce or induce, by fear of loss, such customers or persons willing to deal with the complainant, to break their contracts with the complainant, or to refrain from dealing with the complainant"; also against "coercing or inducing such employees by fine or expulsion from a labor union, or by threat of such fine or expulsion to refrain from being employed by such customers with the intent or effect aforesaid."

⁵ *Booth v. Burgess*, *supra*.

⁶ In some instances, it seems difficult to determine whether a decision rests on the ground of the inherent illegality of a boycott, or of the illegality of incident acts producing fear of violence. The following may be instances of decisions resting on the latter ground.

In *People v. Wilzig*, 4 N. Y. Crim. R. 403, 414 (N. Y. Co. Oyer & Terminer, 1886), the following action on the part of employees was declared by Barrett, J., in charging the jury, unlawful, as designed to injure the employer's business:

§ 76. **Threat or announcement of intention, as incident to boycott.**—Fear of injury may result from a threat, that is, to do an unlawful act, thus, as has been stated, “where the means used are threatening in their nature and in-

“Parading up and down in front of his (the employer’s) door, placarding themselves with the word ‘boycott,’ advising the passers-by not to patronize the establishment, distributing printed circulars filled with accusation and justifying the so-called ‘boycott,’ and other devices and methods calculated to induce the public to keep away from the alleged wrongdoer.” As to meaning of “intimidation” it was here said: “The defendant’s counsel seem to have the idea that if a body of men, however large, operating in the manner suggested, only avoid acts of physical violence, they are within the law; and that the employer’s business may be ruined with impunity, so long as no blow is struck, nor actual threat by word of mouth uttered. This is an error. The men who walk up and down in front of a man’s shop may be guilty of intimidation, though they never raise a finger or utter a word. Their attitude may nevertheless be that of menace. They may intimidate by their numbers, their methods, their placards, their circulars and their devices.” So in *People v. Kostka*, 4 N. Y. Crim. R. 429, 437 (N. Y. Co. Oyer & Terminer, 1886), the following action was declared by Barrett, J., in charging the jury, unlawful as designed to injure the business of another: “Congregating in numbers near the doors of the person to be injured, printing circulars descriptive of the supposed grievances in more or less emphatic language, and

distributing such circulars near and about his doors to his customers and to passers-by.”

In *Jordahl v. Hayda*, 1 Cal. App. 696; 82 Pac. 1079 (1905), an injunction was allowed against a boycott by employees accompanied with intimidation.

In *Foster v. Retail Clerks’ Protective Assoc.*, 39 Misc. 48, 59; 78 N. Y. Suppl. 860, 868 (Supm. Ct., Sp. T., 1902), the acts enjoined included “the use of threats, violence or intimidation with the intent of preventing travelers upon the highway or intending customers of the plaintiffs from entering the store of the plaintiffs or trading with them or whereby such result is attained.” See §§ 73, 95.

For decisions more or less distinctly resting on the ground of the inherent illegality of a boycott, see § 25. *Colo. R. S.* (1908), § 3924, authorizing combinations “in relation to entering into or remaining in employment” and like purposes, is not to be so construed as to permit persons by threats or display of force “to boycott or intimidate any employer of labor.” In *Branson v. Industrial Workers of the World*, 95 Pac. 354 (Supm. Ct. Nev., 1908), a statute against criminal conspiracy was held applicable to a boycott, accompanied with intimidation and violence, of a newspaper proprietor, instituted because of his refusal to compel his employees to become members of labor organizations.

In *State v. Stockford*, 77 Conn.

tended, and naturally tend, to overcome by fear of loss of property the will of others and compel them to do things which they would not otherwise do.”⁷ It has already been noted that the idea that a threat includes an announcement of intention to do a lawful act has gained considerable prevalence, and that much harm and confusion have resulted by way of misleading courts into holding unlawful such mere announcement of intention, though on principle it is difficult to see any illegality therein, or why it is made illegal by merely calling it a threat. In this view it may be stated that, though by way of incident to a boycott, it is not unlawful to announce one’s intention (or threaten) to do a lawful act, though such announcement of intention produce injury or a fear of injury. It would seem hardly worth the while to devote so much space to the enunciation of so obvious and fundamental a doctrine, were it not that there has appeared a strong tendency in judicial decisions in this country to establish, as especially applicable to acts accompanying strikes and boycotts, a doctrine directly opposed to it.⁸

§ 77. **Threat or announcement of intention to boycott.**—Not

227; 58 Atl. 769; 107 Am. St. Rep. 28 (1904), under G. S. (1902), § 1296, making it a criminal offense to “threaten or use any means to intimidate any person to compel such person against his will to do or abstain from doing any act which such person has a legal right to do . . . or injure or threaten to injure his property with intent to intimidate him,” was sustained a conviction for the employment of certain methods in attempting to induce an employer to execute an agreement with members of a labor union. Among the methods used being inducing refusal to deal with such employer, it was held properly charged that it was lawful to solicit the business which was being done by such employers and to in-

duce their customers by fair means to employ the defendants and their friends, “but that a combination to do these things by threats and intimidation was a criminal combination.”

⁷ So stated in *Beck v. Railway Teamsters’ Protective Union*, 118 Mich. 497, 525; 77 N. W. 13, 24; 42 L. R. A. 407, 418; 74 Am. St. Rep. 421 (1898). The context indicates that by “loss of property” was here meant loss of *business*. The threat in this case was merely an announcement of an intention to do what one had a legal right to do. See § 25.

⁸ Thus conspicuously, in *Beck v. Railway Teamsters’ Protective Union*, *supra*. In *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 122; 30

only is the doctrine just stated applicable to the case of a threat or announcement of intention, as *incident* to a boycott, but it has an especial application to the case of a threat or announcement of intention to boycott. That is to say, if a boycott is not illegal, neither is a mere announcement of intention to boycott.⁹ In some instances, however, this point seems to have been more or less consciously disregarded.

Atl. 881, 889 (1894), the injury complained of was inducing persons to refuse to deal with the complainant. So far as the establishment of the cause of action is concerned, it seems irrelevant, as alleged, that his customers and employees were intimidated. They were not before the court as complainants. But, waiving this point, we submit that there was no intimidation; *at the utmost there was injury or fear of injury resulting from the doing of lawful acts or the threat or announcement of intention to do lawful acts*. As to his employees, members of labor unions, the "threat" was at most merely to enforce against them the rules of the union, if they should continue to patronize the plaintiff, and it was not contended that such rules were illegal, nor was such enforcement illegal, even if these results were as thus described: "A member of a labor organization who does not submit to the edict of his union, asserts his independence of judgment and action at the risk, if not the absolute sacrifice, of all association with his fellow-members. They will not eat, drink, live or work in his company. Branded by the peculiarly offensive epithets adopted, he must exist ostracized, socially and industrially, so far as his former associates are concerned. Freedom of will, under such circumstances, cannot be expected."

Compare *Temperton v. Russell*, 1 Q. B. D. (1893), 715. So, as to the customers, the "threat" was merely to refuse to deal with them; nor does the application of the rule seem affected by the mere extent of the organization concerned in the boycott, representing a purchasing power of \$400,000 a week. The same general observations apply also to *Casey v. Cincinnati Typographical Union*, 45 Fed. 135; 12 L. R. A. 193 (C. C. Ohio, 1891), a case very similar on the facts.

⁹ In *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223; 55 N. W. 1119; 21 L. R. A. 337; 40 Am. St. Rep. 319 (1893), was sustained an agreement contained in the by-laws of an association of retail dealers, not to deal with a wholesale dealer dealing directly with customers not dealers, at a point where a member of the association might be doing business. Here the existence of such by-law may be regarded as an announcement of intention. So held, notwithstanding a demand by the association, in accordance with its by-laws, for a percentage on sales made. So the by-law was declared not to operate as coercion upon the members of the association. Compare *Jackson v. Stanfield*, infra. *Bohn Manuf. Co. v. Hollis* was followed in *Macauley v. Tierney*, 19 R. I. 255; 33 Atl. 1; 37 L. R. A. 455; 61 Am. St. Rep. 770 (1895), as

§ 78. **Strike as distinguished from incident acts of violence or acts producing fear of violence.**—As in case of a boycott, there is no necessary connection between a strike and incident acts of violence or producing fear of violence.¹⁰

applicable to a similar agreement contained in resolutions adopted by an association of master plumbers, it being held not illegal for them to send notices to dealers not to sell to plumbers not members of the association, under penalty of withdrawal of patronage. *Bohn Manuf. Co. v. Hollis* was also applied in *Cote v. Murphy*, 159 Pa. St. 420, 431; 28 Atl. 190, 194; 23 L. R. A. 135, 138; 39 Am. St. Rep. 686 (1894), sustaining an agreement among employers not to sell to persons who had conceded demands of striking employees; also to dissuade others from dealing with them. See also *Buchanan v. Kerr*, 159 Pa. St. 433; 28 Atl. 195 (1894).

On the other hand, in *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906), it was held actionable for those combining to refuse to sell drugs and druggists' supplies to a vendor thereof, to coerce other sellers to abstain from selling to the plaintiff, by means of threats of black-listing and boycotting such sellers if they should sell to the plaintiff.

In the following cases, notwithstanding the bewildering verbiage concerning "conspiracy," "threats," "coercion," and the like, the action declared unlawful was merely that of employees in announcing their intention to induce persons not to deal with their employers or their customers, and it does not appear that there was any injury or threat of injury to person or property. *Crump*

v. Commonwealth, 84 Va. 927, 940; 6 S. E. 620, 627; 10 Am. St. Rep. 895, 906 (1888; see opinion of court below in 11 Va. Law Jour. 324); *State v. Glidden*, 55 Conn. 46, 69; 8 Atl. 890, 893 (1893); 3 Am. St. Rep. 23, 28 (1887). Compare *Old Dominion Steamship Co. v. McKenna*, 30 Fed. 48 (C. C. N. Y., 1887). However it may have been as to the evidence, the court in *Crump v. Commonwealth* were, in our view, clearly in error in refusing to charge as requested, for instance, that if "the alleged conspirators confined themselves to merely announcing to the patrons of B. Bros. (the employers) that they had stopped dealing with that firm, and would not deal with the patrons of said firm, and would get their friends to agree with them in their course," then the prisoner was not guilty. In *Jackson v. Stanfield*, 137 Ind. 592; 36 N. E. 345; 23 L. R. A. 588 (1894), the facts were substantially the same as in *Bohn Manuf. Co. v. Hollis*, supra, but a contrary result was reached, and the by-law held to operate as unlawful "coercion" upon the wholesale dealers, the court disapproving *Bohn Manuf. Co. v. Hollis*. Compare *People v. Duke*, 19 Misc. 292; 44 N. Y. Suppl. 336 (N. Y. Co. Gen. Sess., 1897). In *Jackson v. Stanfield* there is a *dictum* that the by-law operated as coercion upon the members of the association.

¹⁰ See § 73; *Wabash R. Co. v. Hannahan*, 121 Fed. 563, 569 (C. C. Mo., 1903). As to the extent to

§ 79. **Acts of violence as incident to strike.**—What has already been said as to liability for acts of direct violence to person or tangible property, will apply to such acts when incident to a strike, namely, that they are universally regarded as creating a civil or criminal liability, or both.¹¹

which those engaged in a strike are responsible for unlawful acts incident to the strike, it was said in *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49, 53 (C. C. Tenn., 1901), quoting from article in *North American Law Review*: "And indeed acts of violence do occur in connection with strikes, which the labor unions do not approve, and for which they cannot be held responsible. Is it not, however, true that much, at least, of the interference with personal liberty of which we complain, is the direct act of the unions? Are not the pickets of the unions usually the first to have recourse to threats and violence? And, even where mobs are the guilty party, are not the unions indirectly responsible? Should they not have foreseen the acts to which the mobs so easily resort, and should they not have taken measures to obviate such acts? Should they not at least protest when such acts have unfortunately taken place?" See as to application of such statement to facts there under consideration.

¹¹ Thus, in *Cœur D'Alene Consolidated & Mining Co. v. Miners' Union*, 51 Fed. 260; 19 L. R. A. 382 (C. C. Idaho, 1892), an injunction was granted against labor unions and members thereof, restraining them from entering upon the complainant's mines or from interfering with the working thereof, or by the use of force, threats or intimidation, or by other means, from

interfering with or preventing the complainant's employees from working upon its mines. The court said (51 Fed. 262; 19 L. R. A. 384): "The evidence justifies the conclusion that defendants are organized into associations wherein submission to stringent and arbitrary rules is required; that, by means approaching dictation, they have attempted to control employers in the selection of laborers and the wages to be paid them, and have discouraged and, as far as they could, prevented those who do not belong to their societies from procuring work; that by force, in one instance, they took complainant's laborers from its mine to their hall, where, upon such, laborers so refusing to comply with their demands to join them and abide by their laws, they actually ordered their banishment from the State, and, in a manner deserving the most severe condemnation, enforced their lawless decree, and against men who, by reason of their birth, and not through the grace of the government, were entitled to all the rights of American citizenship; that, in such numbers and under such circumstances as were menacing, they have requested non-union men to cease work, and to such have applied in an offensive and threatening manner most opprobrious epithets, and in other ways have annoyed and vexed laborers who refused to join their associations." So in *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811 (C. C. Ohio,

So, in some instances, of acts not strictly of violence, but producing annoyance or discomfort. "However justifiable or even laudable may be the ultimate objects of a strike, un-

1897), an injunction was granted against labor unions and members thereof, it appearing that they, for the purpose of compelling the adoption of a particular scale of wages, were guilty of acts of intimidation and violence, assembling near the entrance to the complainant's mill, preventing its employees from going to their work, assaulting and wounding them. See as to what constitutes "force or violence," or a "threat to use force or violence," under the Utah statute, *People v. O'Loughlin*, 3 Utah, 133; 1 Pac. 653 (1882).

In *Frank v. Herold*, 63 N. J. Eq. 443; 52 Atl. 152 (1902), it was held that, even if the right to induce an employee to quit employment exist, "it must be with the consent of the operatives; it must not be forced upon them in an offensive manner, either at their homes or as they pass along the streets. . . . It cannot be exercised in such a manner as to infringe upon the private rights of the operatives and thereby prevent them against their real wishes from continuing to work." See, for instances of such unlawful acts, e. g., "accosting, annoying and molesting in various ways, female operatives while on their way to and from their work, and also in their homes"; also form of injunction order against such acts. See also *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 173 (C. C. Wis., 1906); *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A., 7th C.,

1908); *Franklin Union v. People*, 220 Ill. 355; 77 N. E. 176; 4 L. R. A. N. S. 1001; 110 Am. St. Rep. 248 (1906); affirming 121 Ill. App. 647 (1905); *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903).

For instances of relief allowed against acts of violence, as incident to strike, see *Sailors' Union v. Hammond Lumber Co.*, 156 Fed. 450; 85 C. C. A. 16 (9th C., 1907); *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*, 66 Atl. 953 (Ct. Ch. N. J., 1907); *National Tel. Co. v. Kent*, 156 Fed. 173 (C. C. W. Va., 1907).

For an instance of an action at law held maintainable for such acts, see *F. R. Patch Manuf. Co. v. Protection Lodge*, 77 Vt. 294; 60 Atl. 74; 107 Am. St. Rep. 765 (1905).

In *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*, 165 Ind. 421; 75 N. E. 877; 2 L. R. A. N. S. 788 (1905), a strike "being properly conceived and conducted by the great majority of members" of a union, it was held no ground for allowing relief against them that a few members "of their own initiative" indulged in unlawful acts.

As to criminal liability for acting in conjunction with striking employees in committing acts of violence, see *State v. Caine*, 134 Iowa, 147; 111 N. W. 443 (1907).

See, generally, as to liability for acts of violence, § 3; as to remedy by injunction and otherwise, c. XI.

lawful means must not be employed in carrying it on." ¹²

§ 80. Acts producing fear of violence, as incident to strike.—

What has already been said as to liability for acts producing fear of violence will apply to such acts when incident to a strike. ¹³

¹² *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 110, 114; 85 N. E. 897, 899 (1908).

¹³ The following seem, generally speaking, to be instances of acts incident to a strike, held unlawful as producing fear of violence, though in some instances the fear seems to have been produced merely by announcement of intention to do a lawful act.

In *Sherry v. Perkins*, 147 Mass. 212; 17 N. E. 307; 9 Am. St. Rep. 689 (1888), an injunction was granted against displaying banners with devices (such, for example, as "Lasters are requested to keep away from S.") as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, as being illegal at common law and by statute. In *Re Wabash R. Co.*, 24 Fed. 217 (C. C. Mo., 1885), it was held illegal to send to employees of a railroad the following notice signed "Chairman": "You are requested to stay away from the shop until the present difficulty is settled. Your compliance with this will command the protection of the Wabash employees. But in no case are you to consider this an intimidation." See *U. S. v. Kane*, 23 Fed. 748 (C. C. Colo., 1885). In *Wick China Co. v. Brown*, 164 Pa. St. 449; 30 Atl. 261 (1894), an injunction was issued against striking employees who conspired to prevent the plaintiff from employing workmen other than those sug-

gested by the defendants, and endeavored to accomplish their purpose "by threats, menaces, intimidations, and opprobrious epithets addressed to plaintiff company's officers and workmen, and by gathering in crowds about the company's place of business and at the boarding places of their workmen, and by following said workmen to and from their work, stopping them on the highways, interfering with them in their work, and by holding them up to ridicule and contempt of bystanders." Very similar was *Murdock v. Walker*, 152 Pa. St. 595; 25 Atl. 492; 34 Am. St. Rep. 678 (1893). See also *Newman v. Commonwealth*, 5 Centr. Rep. 497 (Supm. Ct. Pa., 1886). In *Mackall v. Ratchford*, 82 Fed. 41 (C. C. W. Va., 1897), an injunction against menaces, threats or intimidation by striking miners, to prevent the employees of the mines from going to or from the same, or from engaging in their usual business of mining, was held violated by their marching in a body over two hundred strong in the early hours of the morning before daylight, halting in front of the mine opening, and taking position on each side of the public highway for a distance of at least a quarter of a mile, at the exact places where the miners were in the habit of crossing that highway for the purpose of going from their homes to their work. In *Cook v. Dolan*, 19 Pa. Co. Ct. 401, 408 (1897), acts of striking miners thus character-

§ 81. **Threat or announcement of intention, as incident to strike.**—What has already been said with reference to a threat or announcement of intention as incident to a boycott, may be applied to a strike,¹⁴ and it may be stated that, though by way of incident to a strike, it is not unlawful to announce one's intention (or threaten) to do a lawful act, though such announcement produce injury or fear of injury.¹⁵

ized were held to be coercion: "It certainly cannot be claimed that calling a working miner a 'scab,' a 'blackleg,' a 'black-sheep,' a 'black-leg s— b—,' and threatening him that if he did not come out now that armed men would be sent for, and threatening that personal violence, 'knocking off his ears,' would be resorted to if he went to work, is legitimate persuasion." So of the conduct of "three or four hundred men marching under the plaintiffs' (employers') tramway, and close to their pit mouth, and miners' houses, all armed with a walking stick, singing 'We'll hang "blacklegs" on a sour apple tree.'" In *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49; 46 Atl. 208 (1899), an injunction was granted against acts of striking employees, thus characterized: "It goes without saying that the bombardment of complainant's fences and the boarding house (i. e., where were lodged employees replacing those striking), the attack upon incoming trains carrying employees, and the physical interference with or interception of workmen were illegal acts. So, too, I think, was the gathering of large crowds of workmen about the railroad station to assist in the interception of workmen. The actual outcome of such a crowd was seen at each arrival. The newcomers

were surrounded, and jostled and pushed along, until they were landed in the headquarters of the strikers. It is almost a physical impossibility for the workmen to move otherwise than according to the will of the crowd, however much they may wish to do so."

See also *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 515; 77 N. W. 13, 20; 42 L. R. A. 407, 414; 74 Am. St. Rep. 421 (1898):

In *Rogers v. Evarts*, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891), it was held not unlawful for striking employees to post the names of those contributing and those not contributing funds for the support of the strike.

See generally, as to acts producing fear of violence, § 4; as to remedy by injunction and otherwise, c. XI.

¹⁴ Thus, it was said in *State v. Stewart*, 59 Vt. 273, 289; 9 Atl. 559, 568; 59 Am. Rep. 710, 715 (1887), with reference to striking employees: "The anathemas of a secret organization of men combined for the purpose of controlling the industry of others, by a species of intimidation that works upon the mind, rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence."

¹⁵ See decisions cited under § 6.

§ 82. Strike as induced by acts of violence or acts producing fear of violence, or by announcement of intention to do lawful act.—According to what we have seen to be the accepted doctrine,¹⁶ that it is unlawful to induce another to quit his employment, it follows that, so far, at least, as civil liability is concerned, the means of inducement are immaterial, that is to say, it is immaterial that a strike was induced by acts of violence or by acts producing a fear of violence, or by announcement of intention to do a lawful act, thus in enforcing regulations of a trade union as an inducement to strike or by way of penalty for refusal to strike. But the disposition already noticed to question or repudiate such doctrine¹⁷ seems to have resulted in, or to be accompanied with a disposition to base the illegality of inducing to quit employment not so much on the bald act of inducing, as on accompanying acts of the kind just specified.¹⁸

In *Plant v. Woods*, 176 Mass. 492, 496; 57 N. E. 1011, 1013; 51 L. R. A. 339, 342; 79 Am. St. Rep. 330 (1900), a case of inducing the discharge of employees, where an injunction was allowed against intimidating the employer by threats of "loss or trouble in business," it was said of a "threat to strike, taken in connection with the intimation that the employer may 'expect trouble in his business'": "It means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will by strong, persistent and organized persuasion and social pressure of every description, do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his prop-

erty; that attempts in all the ways practiced by organized labor will be made to injure him in his business, even to his ruin if possible; and that by the use of vile and opprobrious epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ; and that whether or not all this be done by the strikers or only by their sympathizers, or with the open sanction and approval of the former, he will have no help from them in his efforts to protect himself."

¹⁶ See § 65.

¹⁷ See § 65.

¹⁸ Thus, in *Longshore Printing Co. v. Howell*, 26 Oreg. 527, 544; 38 Pac. 547, 552; 28 L. R. A. 464, 473; 46 Am. St. Rep. 640 (1894), the doctrine in question was ignored and the decision made to turn on the legality of *the accompanying acts*.

§ 83. Threat or announcement of intention to strike.—A strike not being illegal, neither is a mere announcement of in-

That is to say, the Oregon statute making it a misdemeanor to "by force, *threats or intimidation*, prevent or endeavor to prevent any person employed by another, from continuing or performing his work, or from accepting any new work or employment," was held to have no application to a case of officers of a labor union entering upon an employer's premises, and ordering members of the union then at work under contract with it, to cease work "under penalty of being dealt with according to the laws and regulations of said union," or to a resolution of such union ordering all union men working for such employer to cease working for it. The court said (26 Oreg. 546; 38 Pac. 553; 28 L. R. A. 473): "No intimidation is specifically alleged or shown, unless it can be inferred that, by a refusal to quit, the members of the union would subject themselves to the charge of insubordination to the order, and it does not appear that there was sufficient odium attached to this, to put the members in fear, or that compliance with the order and resolution was induced thereby." So held, notwithstanding allegations in the complaint here held bad on demurrer, that by the first order the employees "were intimidated and influenced and without delay immediately obeyed"; that, "being intimidated," they obeyed the second order, and "ceased to fulfill their contracts with plaintiff." Furthermore, the rules of the union provided for suspension or expulsion for failure to comply with such an order. So, too, statutes making it a misdemeanor to "wil-

fully and wrongfully commit any act which grossly injures the property of another," or to "either verbally, or by any written or printed communication, threaten any injury to the person or property of another . . . with intent thereby to extort any pecuniary advantage or property from such other, or with intent to compel such other to do any act against his will," were held to have no application. In *Temperon v. Russell*, 1 Q. B. D. (1893) 715, 726, where an action against members of a joint committee of labor unions, for inducing breaking of a contract with the plaintiff, was sustained, the action of the committee in notifying members of the union to withdraw from the employment of the person with whom the plaintiff had contracted, was declared illegal. The court said: "These men had bound themselves to obey; and they knew that they had done so, and that if they did not obey, they would be fined or expelled from the union to which they belonged." In *Coons v. Chrystie*, 24 Misc. 296; 53 N. Y. Suppl. 668 (Supm. Ct., Sp. T., 1898), where an injunction against calling out employees was granted in a case where there was no evidence of violence, or threat of violence, save as might be inferred from the mere act of calling out, the court said: "If, at the mere nod or word of the latter, the plaintiff's workmen were led immediately to abandon employment which they had been well content to accept, and which, but for the 'walking delegate's' appearance upon the scene, they were just as content to retain, the infer-

tention to strike,¹⁹ though, as in case of a boycott,²⁰ in some instances this point seems to have been disregarded.²¹

§ 84. **Definition of picketing.**—The legality of what has been termed “picketing” on the part of striking employees has frequently been presented for judicial consideration. Inherently the act of picketing seems to involve nothing more than

ence is irresistible that they were coerced by the anticipation of some recognized penalty, and the absence of threats at the moment would signify merely that threats were gratuitous and unnecessary.”

As to coercion involved in calling out or threatening to call out member of a labor union, see also *Quinn v. Leatham*, App. Cas. (1901) 495, 538.

¹⁹ See *Longshore Printing Co. v. Howell*, 26 Oreg. 527, 543; 38 Pac. 547, 552; 28 L. R. A. 464, 472; 46 Am. St. Rep. 640 (1894). In *Commonwealth v. Sheriff*, 15 Phila. (Pa.) 393 (1881), the prohibition of the Pennsylvania statute of 1876 against hindering persons from laboring, by “the use of force, threat, or menace of harm to persons or property,” was held not to cover the case of persons who, on behalf of a labor organization, demanded of employers an increase of wages of certain employees, and notified them that a refusal would result in a strike of themselves, followed by notifying such employees that a strike was ordered. Compare with *People v. Barondess*, 133 N. Y. 649; 31 N. E. 240 (1892; see § 66).

By the English Conspiracy and Protection of Property Act of 1875, it is forbidden to “wrongfully and without legal authority” do any of certain specified acts, “with a view to compel any other person to ab-

stain from doing or to do any act which such other person has a legal right to do or abstain from doing.” One such class is “using violence to, or *intimidating*, such other person or his wife or children, or injuring his property.” Held in *Gibson v. Lawson*, 2 Q. B. D. (1891) 557, not to apply to the action of a member of a labor union, in announcing to the complainant’s employer that the union had resolved to strike unless the complainant joined the union. There was no violence or threat of violence to his person or property, but merely fear of loss of employment, produced by the action of the union. It seems that “intimidation,” as the word is here used, is limited to “such intimidation as implies a threat of personal violence.” See also *Curran v. Treleaven*, Id. 560. Compare *Judge v. Bennett*, 36 Weekly Rep. 103 (1887). Under a former statute, “threats or intimidation” had been held to cover the case of announcement of intention to leave employment in a body. *Walsby v. Anley*, 3 El. & El. 516 (1861). See *Skinner v. Kitch*, 2 Q. B. 393 (1867). See article in 42 Am. Law Rev. 200 (1908) by C. R. Darling.

²⁰ See § 77.

²¹ Such “threats” by representatives of labor unions were considered illegal in *O’Brien v. People*, 216 Ill. 354; 75 N. E. 108; 108 Am. St. Rep. 219 (1905).

mere observation, and this view is justified by the sense in which the word is used in relation to military movements, a picket being defined as "a guard posted in front of an army to give notice of the approach of the enemy."²² So in its application to striking employees picketing is defined as (placing) "relays of guards in front of a factory or the place of business of the employer, for the purpose of watching who should enter or leave the same,"²³ or as "simply the active watch by workmen belonging to those lodges or associations or unions, of others, so that they may know what is going on and what is done,"²⁴ or as "the establishment and maintenance of an organized espionage upon the works, and upon those going to and from them."²⁵

§ 85. **Picketing whether illegal.**—It is difficult to see any illegality in picketing as just defined, and the weight of authority seems to be to the effect that it is not illegal.²⁶ Yet there

²² Century Dictionary.

²³ *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49; 46 Atl. 208 (1899). See *Mills v. U. S. Printing Co.*, 99 App. D. 605, 609; 91 N. Y. Suppl. 185, 187 (1904); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. Ohio, 1906).

In *Atkins v. Fletcher Co.*, 65 N. J. Eq. 658; 55 Atl. 1074 (1903), striking employees were refused an injunction against interference with pickets maintained by them near the premises of the employer.

²⁴ *Winslow v. Building Trades Council* (Case & Comment, Aug., 1899), cited in *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, supra.

²⁵ *Otis Steel Co. v. Local Union*, 110 Fed. 698 (C. C. Ohio, 1901). See also definitions in *Reg. v. Herbert*, 13 Cox C. C. 82 (1875). As to "watching" and "besetting" under English statute, see *Reg. v. Bauld*, Id. 282 (1876).

²⁶ For instances of injunctions refused against picketing, unaccompanied with violence or threats of violence, see *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A., 7th C., 1908); see previous decision in *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 172 (C. C. Wis., 1906); *Jones v. E. Van Winkle Gin & Machine Works*, 62 S. E. 236; 17 L. R. A. N. S. 848 (Supm. Ct. Ga., 1908); *Karges Furniture Co. v. Amalgamated Woodworkers Local Union*, 165 Ind. 421; 75 N. E. 877; 2 L. R. A. N. S. 788 (1905); *Mills v. U. S. Printing Co.*, 99 App. D. 605, 609; 91 N. Y. Suppl. 185, 187 (1904); *Rogers v. Evarts*, 17 N. Y. Suppl. 264 (1891); said in *Mills v. U. S. Printing Co.* to have been affirmed as *Reynolds v. Everett*, 67 Hun, 294; 22 N. Y. Suppl. 306 (1893); affirmed in 144 N. Y. 189; 39 N. E. 72 (1894); *Krebs v. Rosenstein*, 31 Misc. 661; 66 N. Y. Suppl. 42 (1900); affirmed in *Kerbs v. Rosenstein*, 56 App. D.

is observable a tendency to regard picketing as inherently illegal, such tendency being perhaps referable, not so much to the view that the picketing itself is illegal, as to the view that it is inseparably associated with acts that are indisputably illegal. Thus a picket has been defined as "a body of men belonging to a trades union sent to watch *and annoy* men working in a shop not belonging to the union, or against which a strike is in progress."²⁷ With reference to such definition it has been said: "The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it."²⁸ The view that

619; 67 N. Y. Suppl. 630 (1900); *Levy v. Rosenstein*, 66 N. Y. Suppl. 101 (1900); affirmed in 56 App. D. 618; 67 N. Y. Suppl. 630 (1900); *Foster v. Retail Clerks' Protective Assoc.*, 39 Misc. 48, 57; 78 N. Y. Suppl. 860, 867 (Supm. Ct., Sp. T., 1902); *Butterick Publishing Co. v. Typographical Union No. 6*, 50 Misc. 1; 100 N. Y. Suppl. 292 (Supm. Ct., Sp. T., 1906); *Searle Manuf. Co. v. Terry*, 56 Misc. 265; 106 N. Y. Suppl. 438 (Supm. Ct., Sp. T., 1905); *Waddey Co. v. Richmond Typographical Union*, 105 Va. 188; 53 S. E. 273; 5 L. R. A. N. S. 792 (1906).

See also *Reg. v. Hibbert*, 13 Cox C. C. 82 (1875); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. Ohio, 1906); *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500, 521 (C. C. Nev., 1908); *Christensen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61, 75 (1903); *Perkins v. Rogg*, 28 Weekly L. Bull. 32 (Cin. Super. Ct., 1892); *Standard Tube, etc., Co. v. International Union of Bicycle Workers*, 7 Ohio N. P. 87 (Lucas Com. Pl., 1899).

As to effect of injunctive order as including peaceful picketing, see

Vilter Manuf. Co. v. Humphrey, 132 Wis. 587; 112 N. W. 1095; 13 L. R. A. N. S. 591 (1907).

In *City of St. Louis v. Gloner*, 210 Mo. 502; 109 S. W. 30; 15 L. R. A. N. S. 973 (1908), a municipal ordinance declaring it a misdemeanor to "lounge, stand or loaf around or about or at street corners or other public places" was held invalid as applied to mere picketing.

For prohibition in Colo. R. S. (1908), § 398 of "picketing" and "patrolling," see § 25.

See, on the general subject, articles in 40 Am. Law Rev. 196 (1906) by J. W. Bryan; 18 Harv. Law Rev. 423 (1905) by E. W. Huffcut.

²⁷ Century Dictionary.

²⁸ *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 520; 77 N. W. 13, 22; 42 L. R. A. 407, 416; 74 Am. St. Rep. 421 (1898), where, in allowing an injunction against acts of members of labor unions to include "picketing," it was said: "To picket complainants' premises in order to intercept their teamsters or persons going there to trade, is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways

picketing is inherently illegal has been thus expressed: "The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. . . . Any picket line must result in annoyance, both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge." ²⁹ "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." ³⁰

§ 86. **Picketing accompanied with acts of violence or producing fear of violence.**—Although, in the view already taken, there is nothing illegal in mere picketing, those engaged in picketing have frequently as incident thereto committed undoubtedly unlawful acts of violence or producing fear of violence. As to acts of violence little need be said. The question of principal difficulty is when the acts of those engaged in picketing are unlawful as producing a fear of violence. The act of picketing is commonly not that of a mere solitary indi-

and public streets must be free to all for the purposes of trade, commerce and labor. The law protects the buyer, the seller, the merchant, the manufacturer and the laborer in the right to walk the streets unmolested. It is no respecter of persons; and it makes no difference, in effect, whether the picketing is done 10 or 1,000 feet away. It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce." *Beck v. Railway Teamsters' Protective Union* was applied in *Ideal Manuf. Co. v. Ludwig*, 149 Mich. 133; 112 N. W. 723; 119 Am. St. Rep. 656 (1907), in

punishing for contempt for violation of injunction.

As to sufficiency of cause of action for picketing, see *Crescent Feather Co. v. United Upholsterers' Union*, 153 Cal. 433; 95 Pac. 871 (1908).

²⁹ *Barnes v. Chicago Typographical Union*, 232 Ill. 424; 83 N. E. 940; 14 L. R. A. N. S. 1018 (1908). Here picketing was held illegal even in absence of violence or threats of violence.

³⁰ *Atchison, T. & S. F. Ry. Co. v. Gee*, 139 Fed. 582 (C. C. Iowa, 1905). This language was approved and applied in *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*, 66 Atl. 953 (Ct. Ch. N. J., 1907).

vidual, but of, it may be, fifty, or a hundred, or hundreds of striking employees. And, not to speak of open threats, when the words and tones and gestures of those picketing evince an inclination toward acts of violence, there seems to be a reasonable basis for the doctrine that accords with the weight of authority, namely, that picketing under such conditions is unlawful, or, perhaps to speak more accurately, the acts incident to the act of picketing are under such conditions unlawful. It is obviously difficult, if not impossible, to draw a sharp line of distinction between such incident acts as are, and such as are not, unlawful. Thus it has been said: "The decision of the question, I think, must depend upon the circumstances surrounding each case. There must be taken into account the size of the guard, the extent of their occupation of the street, and what they say and do. Taking every circumstance into account, if it appears that the purpose of the picketing is to interfere with those passing into or out of the works, or those wishing to pass into the works, by other than persuasive means, it is illegal. If the design of the picketing is to see who can be the subject of persuasive inducements such picketing is legal."³¹

³¹ *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49; 46 Atl. 208 (1899). An injunction was here allowed under conditions thus described: "The crowds spoken of as 'guards,' judged by their size and acts, were designed for coercive, as well as persuasive, purposes. Conceding that a number of strikers could remain in the vicinity of the factory yard to see what was going on, yet when the number became a crowd, and when the acts of the crowd expanded into occasional attacks upon property and abusive language towards employees, and interference with those seeking to enter the yard, the 'guard' became a coercive instrument. A permanent guard in a public street in front of citizens' houses or fac-

tories is in itself a nuisance." See *Reg. v. Druitt*, 10 Cox C. C. 592, 602 (1867); *Reg. v. Shepherd*, 11 Id. 325 (1869); *Reg. v. Hibbert*, 13 Id. 82 (1875); *Mills v. U. S. Printing Co.*, 99 App. D. 605, 609; 91 N. Y. Suppl. 185, 187 (1904).

For instances of injunctions allowed under similar conditions, see *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 Fed. 608 (C. C. Ohio, 1898); *Otis Steel Co. v. Local Union*, 110 Fed. 698 (C. C. Ohio, 1901); *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49 (C. C. Tenn., 1901); *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. 264 (C. C. Ill., 1901); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. Ohio, 1906); *Goldfield Consol. Mines Co. v. Goldfield Miners'*

§ 87. **Picketing accompanied with inducing to refuse to enter or continue in employment.**—As already seen, it is, according to the prevailing doctrine, unlawful to induce an employee

Union, 159 Fed. 500 (C. C. Nev., 1908); Jones v. E. Van Winkle Gin & Machine Works, 62 S. E. 236; 17 L. R. A. N. S. 848 (Supm. Ct. Ga., 1908); Beaton v. Tarrant, 102 Ill. App. 124 (1902); Christensen v. Kellogg Switchboard, etc., Co., 110 Ill. App. 61 (1903); Christensen v. People, 114 Ill. App. 40, 61 (1904); Piano & Organ Workers' Union v. Piano & Organ Supply Co., 124 Ill. App. 353 (1906); Davis Machine Co. v. Robinson, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903); Butterick Publishing Co. v. Typographical Union No. 6, 50 Misc. 1; 100 N. Y. Suppl. 292 (Supm. Ct., Sp. T., 1906); N. Y. Central Iron Works Co. v. Brennan, 105 N. Y. Suppl. 865 (Supm. Ct., Sp. T., 1907).

As to evidence of violation of injunction in such case, see Franklin Union v. People, 220 Ill. 355; 77 N. E. 176; 4 L. R. A. N. S. 1001; 110 Am. St. Rep. 248 (1906); affirming 121 Ill. App. 647 (1905); Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155, 173, 179 (C. C. Wis., 1906).

In *Otis Steel Co. v. Local Union*; *Southern Ry. Co. v. Machinists' Local Union*; *Allis Chalmers Co. v. Reliable Lodge*, supra; *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 117 (C. C. Neb., 1902), intimidation was held evidenced by the circumstance of those taking the places of the striking employees submitting to continued confinement within the works where they were employed. In *Otis Steel Co. v. Local Union*, it was said: "Persuasion too emphatic

or too long and persistently continued may itself become a nuisance, and its use a form of unlawful coercion." To the same effect, *Union Pac. R. Co. v. Ruef*, supra. See also *Knudsen v. Benn*, 123 Fed. 636 (C. C. Minn., 1903); *Atchison, T. & S. F. Ry. Co. v. Gee*, 139 Fed. 582; 140 Fed. 153 (C. C. Iowa, 1905); *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 181 (C. C. Wis., 1906); *Christensen v. People*, supra; *Mills v. U. S. Printing Co.*, 99 App. D. 605, 609; 91 N. Y. Suppl. 185, 187 (1904); *George Jonas Glass Co. v. Glass Blowers' Assoc.*, 64 N. J. Eq. 640; 54 Atl. 565 (1903).

In *Union Pac. R. Co. v. Ruef*, it was said: "Picketing in proximity to the shops or elsewhere on the streets of the city, if in fact it annoys or intimidates the new employees, is not allowable. The streets are for public use, and the new employee has the same right, neither more nor less, to go back and forth, freely and without molestation, and without being harassed by so-called arguments and without being picketed, as has a defendant or other person." An injunction was here allowed because of the employment of methods "attended with assaults and violence and intimidations and terrorizing."

By § 7 of the English Conspiracy & Protection of Property Act (1875), it is made unlawful for any person "with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and

to quit his employment,³² and, it may be, to induce one to refuse to enter the employment of another.³³ Such acts of inducement are frequently incident to the act of picketing, that is to say, those engaged in picketing frequently induce or seek to

without legal authority," to "watch or beset the house or other place where such other person resides, or works or carries on business, or happens to be, or the approach to such house or place."

By § 2 of the Trade Disputes Act of 1906, "it shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." See *Larkin v. Belfast Harbour Comm'rs*, 2 Irish Rep. (1908) 214; article in 42 Am. Law Rev. 200 (1908) by C. R. Darling.

For decisions under the act of 1875, see § 87; also *Farmer v. Wilson*, 69 L. J. Q. B. 496 (1900); *Ward v. Operative Printers' Assistants' Soc.*, 22 Times L. R. 327 (1906). In *State v. Stockford*, 77 Conn. 227; 58 Atl. 769; 107 Am. St. Rep. 28 (1904), under G. S. (1902), § 1296, making it a criminal offense to "threaten or use any means to intimidate any person to compel such person against his will to do or abstain from doing any act which such person has a legal right to do . . . or injure or threaten to injure his property with intent to intimidate him," was sus-

tained a conviction for the employment of certain methods in attempting to induce an employer to execute an agreement with members of a labor union. One of the methods employed being picketing, the legality of picketing under certain conditions was recognized, but it was held properly charged that "the placing of pickets to induce one to leave his employer's service by threats and intimidation was unlawful."

In *Goldberg v. Stablemen's Union*, 149 Cal. 429; 86 Pac. 806; 8 L. R. A. N. S. 460; 117 Am. St. Rep. 145 (1906), was held maintainable an action based on allegations that "with intent to threaten and intimidate employees and patrons and customers of plaintiff," the defendants kept "immediately in front of plaintiff's place of business and threatened so to keep there, representatives and pickets bearing placards and transparencies" bearing the words and figures: "Unfair firm; reduced wages of employees 50c per day. Please don't patronize," and that "by said means they had intimidated patrons and customers of plaintiff from entering said place of business." The acts in question were said to be mostly connected with a boycott of the plaintiff's business. For form of injunction allowed, see § 104.

See generally, as to liability for acts of violence or producing fear of violence, §§ 3, 4.

³² See § 65.

³³ See § 66.

induce persons to quit the employment of the person against whom the strike is directed, or to refuse to enter such employment. It seems obvious, however, that the legality of such acts, being determined by the doctrine above stated, in no way depends on the circumstance of their being incident to the act of picketing.³⁴

³⁴ In *Vegeahn v. Guntner*, 167 Mass. 92, 97; 44 N. E. 1077; 35 L. R. A. 722, 723; 57 Am. St. Rep. 443 (1896), the maintenance of a patrol in front of the plaintiff's place of business, for the purpose of inducing persons to leave or refrain from entering his employment, was enjoined under the conditions thus stated: "Following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from 6:30 A. M. until 5:30 P. M., on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen, and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts." There were dissenting opinions by Field and Holmes, JJ., the latter of which is

especially instructive. See as to reference to Massachusetts and other statutes making it "a criminal offense for one by intimidation or force to prevent or seek to prevent a person from entering into or continuing in the employment of a person or corporation." So far as the acts here in question constituted an enticement to leave employment, the decision that they were illegal might be sustained on the ground indicated in the text. See *Knudsen v. Benn*, 123 Fed. 636 (C. C. Minn., 1903); *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903); *Reg. v. Hibbert*, 13 Cox C. C. 82 (1875); *State v. Stockford*, 77 Conn. 227; 58 Atl. 769; 107 Am. St. Rep. 28 (1904); *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 172 (C. C. Wis., 1906).

As to injunction against "unlawful persuasion," see *Flannery v. People*, 225 Ill. 62; 80 N. E. 60 (1907); affirming 127 Ill. App. 526 (1906); *Franklin Union v. People*, 220 Ill. 355, 386; 77 N. E. 176, 187; 4 L. R. A. N. S. 1001, 1017; 110 Am. St. Rep. 248 (1906); affirming 121 Ill. App. 647 (1905).

Under the prohibition of the English Conspiracy and Protection of Property Act of 1875 (see § 86), an injunction was allowed in *Lyons v. Wilkins*, 1 Ch. (1896) 811, against "watching and besetting" the works of employers, for the purpose of

persuading, or otherwise preventing persons from working for them. So in a subsequent decision in 78 L. T. N. S. 618 (1898), an appeal from which was dismissed in 1 Ch. (1899) 255, against watching or besetting the premises of a person for the purpose of persuading or otherwise preventing him from working for such employer. See also *Charnock v. Court*, 2 Ch. (1899) 35; *Walters v. Green*, 2 Ch. (1899) 696; *Krug Furniture Co. v. Berlin Union*, 5 Ont. Law Rep. 463 (1903). That, in view of the statute involved, *Lyons v. Wilkins* "is not a precedent in this country," see *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 181 (C. C. Wis., 1906).

By Ala. Crim. Code (1907), § 6395, it is made a criminal act to "go near to or loiter about the premises or place of business of any person, firm or corporation engaged in a lawful business, for the purpose of influencing or inducing others not to trade with, buy from, sell to, or have business dealings with such person, firm or corporation, or to picket the works or place of business of such other person, firm or corporation, for the purpose of interfering with or injuring any lawful business or enterprise." But "nothing herein shall prevent any person from soliciting trade or business for a competitive business."

CHAPTER XI

REMEDIES

- § 88. Civil action at law.
- 89. Indictment.
- 90. Injunction.
- 91. Injunction against act punishable as crime
- 92. Injunction against use of words.
- 93. Injunction against libel.
- 94. Words producing injury or fear of injury, and libelous words.
- 95. Injunction against boycott.
- 96. Injunction against inducing breach of contract.
- 97. Injunction against quitting employment.
- 98. Injunction against strike.
- 99. Injunction against inducing to quit employment.
- 100. Injunction against inducing not to enter employment.
- 101. Injunction against preventing from securing or continuing in employment.
- 102. Injunction against interference with receiver.
- 103. Injunction against unlawful acts of striking employees or those in sympathy with them.
- 104. Injunction against picketing or acts incident thereto.
- 105. Injunction against blacklisting.

§ 88. **Civil action at law.**—Generally speaking, for any of the injuries thus far discussed, an action at law for damages is an available remedy.¹

§ 89. **Indictment.**—Sometimes, as in case of murder, rob-

¹ Thus, for so-called injury to business, see § 7. So for discharge from employment. *Miller v. Warner*, 42 App. D. 208; 59 N. Y. Suppl. 956 (1899).

See article in 34 Am. Law Reg. & Rev. 102 (1895) by S. B. Stanton, on "Mandamus as a Means of Settling Strikes."

In *Hopkins v. Oxley Stave Co.*, 83 Fed. 912; 28 C. C. A. 99 (8th

C., 1897), was applied the rule that, where the cause of action arises *ex delicto*, the injured party may sue either one or more of the joint wrongdoers. To like effect *Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor*, 156 Fed. 809 (C. C. Mont., 1907).

As to sufficiency of pleading, see *Davitt v. American Bakers' Union*, 124 Cal. 99; 56 Pac. 775 (1899).

bery or violent assault, the remedy by indictment exists, either concurrently or exclusively.² So, too, in case of conspiracy.³

§ 90. **Injunction.**—The questions of greatest difficulty that arise with reference to the application of remedies for such injuries are as to the availability of the remedy by injunction in particular cases. The circumstance that the injuries in question are frequently the acts of considerable numbers of persons, and cover a considerable extent of territory, besides being frequently repeated, has within a comparatively recent period⁴ led to the extensive use of injunctions in the case of strikes and boycotts, and acts accompanying the same. The rules applicable to injunctions generally are applicable here.⁵ The free

As to liability for aiding and abetting overt acts of others, see *George Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*, 66 Atl. 953 (Ct. Ch. N. J., 1907).

² For statutes imposing criminal liability for acts of violence or producing fear of violence, see §§ 3, 4.

³ See § 13.

⁴ In *Consolidated Steel & Wire Co. v. Murray*, 80 Fed. 811, 827 (C. C. Ohio, 1897), it was said, citing Stimson's hand-book of the "Labor Law of the United States," that the remedy by injunction, as applied to labor disputes, is traced back to *Springhead Spinning Co. v. Riley*, 6 L. R. Eq. Cas. 551 (1868). See also *U. S. v. Sweeney*, 95 Fed. 434, 447 (C. C. Ark., 1899). And in so recent a decision as *Mayer v. Journeymen Stonecutters' Assoc.*, 47 N. J. Eq. 519, 527; 20 Atl. 492, 495 (1890), it was said with reference to "the effort to control employment and wages, by labor organizations," that "the industry, research and learning of the distinguished counsel of the complainants has furnished but one reported case where a court of equity has interfered to

prevent or control the action of such organizations. All of the reported cases save three, referred to by counsel, were proceedings of a criminal nature, either by information or indictment." Bearing in mind that the word "boycott" was not used in any American decision prior to 1887 (see § 24), there seems to be but a limited scope for the application of the following statement in *Casey v. Cincinnati Typographical Union*, 45 Fed. 135, 143; 12 L. R. A. 193, 199 (C. C. Ohio, 1891): "No case has been cited where, upon a proper showing of facts, an unsuccessful appeal has been made to a court of chancery to restrain a boycott."

⁵ For prohibition of injunctions in case of trade disputes, see *Okla. L.* 1907, c. 53, art. 2, § 2.

As to the existence of the remedy being based on the general ground of the inadequacy of other remedies, see *Proctor & Collier Co. v. Mahin*, 93 Fed. 875 (C. C. Ill., 1899); *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49, 52 (C. C. Tenn., 1901); *Boyer v. Western Union Tel. Co.*, 124 Fed. 246 (C. C. Mo., 1903); *Miller v. War-*

application of this remedy to labor disputes, producing what has been characterized as "government by injunction," has been

ner, 42 App. D. 208; 59 N. Y. Suppl. 956 (1899); *Atkins v. Fletcher Co.*, 65 N. J. Eq. 658; 55 Atl. 1074 (1903); *Pickett v. Walsh*, 192 Mass. 572, 589; 78 N. E. 753, 760; 6 L. R. A. N. S. 1067, 1081; 116 Am. St. Rep. 272 (1906).

As to requisites of complaint, see *Badger Brass. Manuf. Co. v. Daly*, 119 N. W. 328 (Supm. Ct. Wis., 1909).

As to necessity that applicant come into court with clean hands, see *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 452; 41 S. E. 553, 563; 57 L. R. A. 547, 558; 90 Am. St. Rep. 126 (1902).

In *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 116 (C. C. Neb., 1902), was deprecated the practice of allowing an injunction against those as to whom "the evidence is meager or wholly lacking."

As to application of injunction to one not party, see *Employers' Teaming Co. v. Teamsters' Joint Council*, 141 Fed. 679 (C. C. Ill., 1905); reversed in *Garrigan v. U. S.*, 163 Fed. 16 (C. C. A., 7th C., 1908); *Huttig Sash & Door Co. v. Fuelle*, 143 Fed. 363 (C. C. Mo., 1906); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. Ohio, 1906); *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155, 184 (C. C. Wis., 1906); *Christensen v. People*, 114 Ill. App. 40, 59 (1904); affirmed as *O'Brien v. People*, 216 Ill. 354; 75 N. E. 108; 108 Am. St. Rep. 219 (1905); *Anderson v. Indianapolis Drop Forging Co.*, 34 Ind. App. 100; 72 N. E. 277 (1904); *People ex rel. Stearns v. Marr*, *infra*.

Compare *American Steel & Wire*

Co. v. Wire Drawers', etc., Unions, 90 Fed. 598, 604 (C. C. Ohio, 1898), discussing effect of *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695 (C. C. Kan., 1896).

In *Ideal Manuf. Co. v. Wayne Circuit Judge*, 139 Mich. 92; 102 N. W. 372 (1905), where an employer sought relief against unlawful acts of members of a labor union, it was held improper to refuse a preliminary injunction until the defendants had been brought in on an order to show cause. *Mandamus* was allowed requiring such an injunction to be issued.

An injunction was allowed against a part only of the defendants, in *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 116 (C. C. Neb., 1902); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. Ohio, 1906); *Perkins v. Rogg*, 28 Weekly Law Bull. 32 (Cin. Super. Ct., 1892).

As to proceedings to punish for contempt for disobedience to injunction, see *U. S. v. Sweeney*, 95 Fed. 434, 446 (C. C. Ark., 1899); *Castner v. Pocahontas Collieries Co.*, 117 Fed. 184 (C. C. Va., 1902); *Ex parte Haggerty*, 124 Fed. 441 (C. C. W. Va., 1902); *Atchison, T. & S. F. Ry. Co. v. Gee*, 139 Fed. 582 (C. C. Iowa, 1905); *Huttig Sash & Door Co. v. Fuelle*, 143 Fed. 363 (C. C. Mo., 1906); *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155 (C. C. Wis., 1906); *Garrigan v. U. S.*, 163 Fed. 16 (C. C. A., 7th C., 1908); reversing *Employers' Teaming Co. v. Teamsters' Joint Council*, 141 Fed. 679 (C. C. Ill., 1905); *O'Brien*

subjected to fierce criticism, involving a controversy that we consider it needless to here enter upon.⁶

v. People, *supra*; Franklin Union v. People, 220 Ill. 355; 77 N. E. 176; 4 L. R. A. N. S. 1001; 110 Am. St. Rep. 248 (1906); Flannery v. People, 225 Ill. 62; 80 N. E. 60 (1907); affirming 127 Ill. App. 526 (1906); Hake v. People, 230 Ill. 174; 82 N. E. 561 (1907); Barnes v. Typographical Union, 232 Ill. 402; 83 N. E. 932; 14 L. R. A. N. S. 1150; 122 Am. St. Rep. 129 (1908); Anderson v. Indianapolis Drop Forging Co., *supra*; Casson v. McIntosh, 199 Mass. 443; 85 N. E. 529 (1908); Enterprise Foundry Co. v. Iron Molders' Union, 149 Mich. 31; 112 N. W. 685; 13 L. R. A. N. S. 598 (1907); George Jonas Glass Co. v. Glass Bottle Blowers' Assoc., 53 Atl. 138 (1902); 64 N. J. Eq. 640; 54 Atl. 565 (1903); People ex rel. Stearns v. Marr, 181 N. Y. 463; 74 N. E. 431; 106 Am. St. Rep. 562 (1905); affirming 88 App. D. 422; 84 N. Y. Suppl. 965 (1903); Vilter Manuf. Co. v. Humphrey, 132 Wis. 587; 112 N. W. 1095; 13 L. R. A. N. S. 591 (1907); Buck's Stove & Range Co. v. American Federation of Labor, 36 Wash. Law Rep. 822 (Supm. Ct. D. C., 1908).

As to objection to jurisdiction in proceeding to punish for contempt, see Franklin Union v. People, *supra*.

As to sufficiency of moving papers and effect of answer, see Employers' Teaming Co. v. Teamsters' Joint Council, *supra*.

In McBride v. People, 225 Ill. 315; 80 N. E. 306 (1907), in a proceeding to punish for contempt for violation of injunction against interference with employer involved in strike with employees. O'Brien

v. People, *supra*, was followed as holding that in such a proceeding "the evidence need not remove all reasonable doubt of the defendant's guilt, but it is very clear that the guilt should be established by a preponderance of the evidence."

That the violator is not entitled to a jury trial, see U. S. v. Sweeney, *supra*.

For a vigorous statement of objections arising under constitutional provisions securing the right of trial by jury, see dissenting opinion of Caldwell, J., in Hopkins v. Oxley Stave Co., 83 Fed. 912, 925; 28 C. C. A. 99, 112 (8th C., 1897), with which see Union Pac. R. Co. v. Ruef, 120 Fed. 102, 112 (C. C. Neb., 1902). See also Southern Ry. Co. v. Machinists' Local Union, *supra*, citing Re Debs, 158 U. S. 564, 594; 15 Supm. 900, 910; 39 L. Ed. 1092 (1895).

That the right to an injunction is "precisely the same" in the Federal as in the State courts, see Union Pac. R. Co. v. Ruef, 120 Fed. 102, 105 (C. C. Neb., 1902).

As to punishment of corporation for contempt, see Franklin Union v. People, *supra*.

As to practice on dissolution of injunction in case of strike, see August Gast Bank Note, etc., Co. v. Fennimore Assoc., 79 Mo. App. 612 (1899).

⁶ See articles in 28 Am. Law Rev. 828 (1894); 50 Alb. Law Jour. 140 (1894) by C. C. Allen; 32 Am. Law Rev. 669 (1898) by J. W. Akin; 40 Id. 42, 196 (1906) by J. W. Bryan; 11 Harv. Law Rev. 487 (1898) by C. N. Gregory; 16 Id. 289 (1902-3) by E. S. Mack; 37

§ 91. **Injunction against act punishable as crime.**—In some instances has been applied the rule that an injunction may be granted against an act that is also punishable as a crime.⁷

§ 92. **Injunction against use of words.**—It is clear that under certain conditions there exists a liability for injury resulting from the use of words as distinguished from acts; also that such liability is enforceable in an action at law, thus for slander or libel.⁸ And injunctions have been allowed against such use of words.⁹ But it seems at least questionable whether the al-

Am. Law Reg. (N. S.) 1 (1898); 44 Id. 465 (1905) by W. D. Lewis; 10 Pol. Sci. Quart. 189 (1895) by F. J. Stimson; 13 Law Quart. Rev. 347 (1897) by W. H. Dunbar; 3 Va. Law Reg. 549 (1897) by W. J. Peterkin; Id. 625 (1898) by S. S. Patterson. See also 2 Eddy on Combinations, § 1011.

⁷ Arthur v. Oakes, 63 Fed. 310, 329; 11 C. C. A. 209, 228; 25 L. R. A. 414, 433 (7th C., 1894); Consolidated Steel & Wire Co. v. Murray, 80 Fed. 811 (C. C. Ohio, 1897); Vegelahm v. Guntner, 167 Mass. 92; 44 N. E. 1077; 35 L. R. A. 722; 57 Am. St. Rep. 443 (1896). See Utah Comp. Laws (1907), § 4491. So in the following cases of acts of striking employees or those in sympathy with them. Union Pac. R. Co. v. Ruef, 120 Fed. 102, 109, 125 (C. C. Neb., 1902); Jones v. E. Van Winkle Gin & Machine Works, 62 S. E. 236; 17 L. R. A. N. S. 848 (Supm. Ct. Ga., 1908); Christensen v. Kellogg Switchboard, etc., Co., 110 Ill. App. 61, 73 (1903); Underhill v. Murphy, 117 Ky. 640; 78 S. W. 482; 111 Am. St. Rep. 262 (1904); Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212; 32 S. W. 1106; 52 Am. St. Rep. 622 (1895); Cumberland Glass Manuf. Co. v. Glass Bottle

Blowers' Assoc., 59 N. J. Eq. 49; 46 Atl. 208 (1899); Davis v. Zimmerman, 91 Hun, 489; 36 N. Y. Suppl. 303 (1895); N. Y. Central Iron Works Co. v. Brennan, 105 N. Y. Suppl. 865 (Supm. Ct., Sp. T., 1907).

See also Matthews v. Shankland, 25 Misc. 604; 56 N. Y. Suppl. 123 (Supm. Ct., Sp. T., 1898). In Union Pac. R. Co. v. Ruef, supra, Hamilton-Brown Shoe Co. v. Saxey, supra, was said not to have been overruled by Marx & Haas Clothing Co. v. Watson, 168 Mo. 133, 150; 67 S. W. 391, 395; 56 L. R. A. 951, 958; 90 Am. St. Rep. 440 (1902). See § 92.

⁸ See, for instance, Ryan v. Burger, etc., Brewing Co., 13 N. Y. Suppl. 660 (Supm. Ct., Gen. T., 1891).

⁹ Thus, to restrain officers of a labor union from printing or publishing placards or advertisements for the purpose of intimidating workmen from entering the service of the plaintiff. Springhead Spinning Co. v. Riley, 6 L. R. Eq. Cas. 551 (1868). So held under a statute, though the acts were declared to be unlawful at common law. So against displaying banners with devices, as a means of threats and intimidation, to prevent persons

lowance of such an injunction is not inconsistent with a constitutional guaranty of freedom of speech.¹⁰

§ 93. **Injunction against libel.**—But we are here confronted with the technical rule, supported by much authority, that an injunction will not be granted against a mere libel.¹¹ It may

from entering into or continuing in the employment of the plaintiffs. *Sherry v. Perkins*, 147 Mass. 212; 17 N. E. 307; 9 Am. St. Rep. 689 (1888).

¹⁰ Under a constitutional provision that "no law shall be passed impairing the freedom of speech; every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty," an injunction against a mere boycott, in the absence of violence or intimidation was held unauthorized in *Marx & Haas Clothing Co. v. Watson*, 168 Mo. 133, 150; 67 S. W. 391, 395; 56 L. R. A. 951, 958; 90 Am. St. Rep. 440 (1902). The court said: "The fact that in exercising that freedom they thereby do plaintiff an actionable injury does not go a hair towards a diminution of their right of free speech, etc., for the exercise of which, if resulting in such injury, the constitution makes them expressly responsible. But such responsibility is utterly incompatible with authority in a court of equity to prevent such responsibility from occurring." This decision was followed in *Lindsay v. Montana Federation of Labor*, 96 Pac. 127 (Supm. Ct. Mont., 1908), in holding not allowable an injunction against publication of a circular as a means of enforcement of a boycott. To like effect seems *Ward v. South Dakota Retail Merchants'*

etc., *Assoc.*, 150 Fed. 413 (D. C. S. D., 1907).

In *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997, 1012 (Supm. Ct. Mo., 1908), in allowing an injunction against a boycott (see § 62), *Marx & Haas Clothing Co. v. Watson* was distinguished as a case of "*publishing* a boycott," it being said: "The clear object of this case is to prohibit the defendants from continuing the boycott in force heretofore declared, or to enjoin the defendants from declaring a threatened boycott against plaintiff's business, and not to enjoin its publication. If the boycott itself is enjoined, there would be no occasion for complaint against its publication."

See criticism of *Marx & Haas Clothing Co. v. Watson* in *Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor*, 156 Fed. 809, 821 (C. C. Mont., 1907). See also editorial note in 36 Am. Law Rev. 609 (1902); also *Buck's Stove & Range Co. v. American Federation of Labor*, 36 Wash. Law Rep. 822, 841 (Supm. Ct. D. C., 1908); *Riggs v. Cincinnati Waiters' Alliance*, 5 Ohio N. P. 386 (Cin. Super. Ct., 1898); *National Tel. Co. v. Kent*, 156 Fed. 173 (C. C. W. Va., 1907); *Jordahl v. Hayda*, 1 Cal. App. 696; 82 Pac. 1079 (1905).

¹¹ For instances of statements held to be mere libels and not furnishing ground for injunctions, see *Balliet v. Cassidy*, 104 Fed. 704 (C.

be easy to see how such rule originated under conditions in which a libel was commonly the act of a single individual. But if the doctrine becomes established that an injunction is under any conditions an available remedy against the use of words producing injury or fear of injury, it is difficult to see on principle why it should not be an available remedy against such use of words as constitutes a libel, when frequently repeated by large numbers of persons over a considerable extent of territory.¹²

C. Oreg., 1900); *Allegretti Chocolate Cream Co. v. Rubel*, 83 Ill. App. 558 (1899); *Mayer v. Journeymen Stonecutters' Assoc.*, 47 N. J. Eq. 519; 20 Atl. 492 (1890); *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384; 64 N. E. 163; 59 L. R. A. 310 (1902); *Owen v. Partridge*, 40 Misc. 415, 422; 82 N. Y. Suppl. 248, 253 (Supm. Ct., Sp. T., 1903); *Butterick Publishing Co. v. Typographical Union No. 6*, 50 Misc. 1; 100 N. Y. Suppl. 292 (Supm. Ct., Sp. T., 1906); *Riggs v. Cincinnati Waiters' Alliance*, 5 Ohio N. P. 386 (Cin. Super. Ct., 1898). See *Ward v. South Dakota Retail Merchants', etc., Assoc.*, 150 Fed. 413 (C. C. S. D., 1907). See, on the general subject, article in 34 Am. Law Rev. 161, 468 (1900) by S. D. Thompson.

In *Richter v. Journeymen Tailors' Union*, 24 Weekly L. Bull. 189 (Franklin Co., Ohio, Com. Pl., 1890), a case of the circulation and posting by members of a labor union, of circulars and posters claimed to contain statements injurious to the plaintiff's business, *Sherry v. Perkins*, supra (§ 92), was distinguished on the ground that there, in addition to the display of the banner, there was the element of intimidation of the plaintiff's em-

ployees. *Springhead Spinning Co. v. Riley*, 6 L. R. Eq. Cas. 551 (1868), supra (§ 92), was said, in *Mayer v. Journeymen Stonecutters' Assoc.*, supra, to have been overruled in *Prudential Assurance Co. v. Knott*, 10 L. R. Ch. App. 142 (1875).

¹² Thus, in *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357 (1846), the jurisdiction to enjoin the continuous display of a placard containing offensive words was recognized, even on the supposition that the placard was a libel.

See *Foster v. Retail Clerks' Protective Assoc.*, 39 Misc. 48, 58; 78 N. Y. Suppl. 860, 867 (Supm. Ct., Sp. T., 1902). See also 2 High on Injunctions (3d ed.), § 1015; 1 Jaggard on Torts, p. 353.

It seems to be the common practice in England to grant injunctions against libels. Thus, in *Trollope v. London Building Trades Federation*, 72 L. T. R. 342 (1895), a case of a trade libel. But as to whether this practice is not based on legislation, see article by W. D. Lewis (see § 94); also by same author in 42 Am. Law Reg. N. S. 322 (1903), and *Kidd v. Horry*, 28 Fed. 773 (C. C. Pa., 1886); *De Wick v. Dobson*, 18 App. D. 399; 46 N. Y. Suppl. 390 (1897); *Owen v. Partridge*, supra.

§ 94. **Words producing injury or fear of injury, and libelous words.**—A distinction has been sought to be maintained between an injunction against the use of words producing injury or fear of injury, and mere libelous words. Thus it has been said: "A clear distinction will be observed between the two classes of cases above noted. In the one, when the acts complained of consist of such misrepresentations of a business that they tend to its injury, and damage to its proprietor, the offense is simply a libel; and in this country the courts have, with great unanimity, held that they will not interfere by injunction, but that the injured party must rely upon his remedy at law. On the contrary, when the attempt to injure consists of acts or words which will operate to intimidate and prevent the customers of a party from dealing with or laborers from working for him, the courts have, with nearly equal unanimity, interposed by injunction."¹³

¹³ *Cœur D'Alene Consolidated & Mining Co. v. Miners' Union*, 51 Fed. 260, 267; 19 L. R. A. 382, 386 (C. C. Idaho, 1892).

Thus in *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 527; 77 N. W. 13, 24; 42 L. R. A. 407, 418; 74 Am. St. Rep. 421 (1898), where an injunction against the distribution of a boycotting circular containing false statements was allowed against the objection that equity will not restrain the publication of a libel, it was said: "If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainants' business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants."

See further, as illustrating this distinction, *Sherry v. Perkins*, supra

(§ 92); *Emack v. Kane*, 34 Fed. 46 (C. C. Ill., 1888); *Casey v. Cincinnati Typographical Union*, 45 Fed. 135; 12 L. R. A. 193 (C. C. Ohio, 1891. Here the authorities were quite carefully considered). See also *Vegetahn v. Guntner*, 167 Mass. 92; 44 N. E. 1077; 35 L. R. A. 722; 57 Am. St. Rep. 443 (1896); *Shoemaker v. South Bend Co.*, 135 Ind. 471; 35 N. E. 280 (1893); *Francis v. Flinn*, 118 U. S. 385; 6 Supm. 1148; 30 L. Ed. 165 (1886); *Arthur v. Oakes*, 63 Fed. 310, 320; 11 C. C. A. 209, 220; 25 L. R. A. 414, 428 (7th C., 1894); *Farquhar Co. v. National Harrow Co.*, 102 Fed. 714; 42 C. C. A. 600; 49 L. R. A. 755 (3d C., 1900); *Adrian v. National Harrow Co.*, 98 Fed. 118 (C. C. N. Y., 1899).

The illogical character of the distinction was fully demonstrated in an article in 31 Am. Law Reg. & Rev. 782 (1892) by W. D. Lewis.

§ 95. Injunction against boycott.—Injunctions against boycotts, or inducing a refusal to deal (or threats thereof) have been rather freely granted.¹⁴

¹⁴ Thus, in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912; 28 C. C. A. 99 (8th C., 1897); *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 451; 41 S. E. 553, 563; 57 L. R. A. 547, 558; 90 Am. St. Rep. 126 (1902); *Hey v. Wilson*, 128 Ill. App. 227 (1906); *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 518; 77 N. W. 13, 21; 42 L. R. A. 407, 415; 74 Am. St. Rep. 421 (1898); *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280, 293; 71 S. W. 455, 459 (1902); *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997 (Supm. Ct. Mo., 1908); *Martin v. McFall*, 65 N. J. Eq. 91; 55 Atl. 465 (1903); *Brace v. Evans*, 3 Ry. & Corp. L. J. 561 (*Allegheny Co., Pa.*, Com. Pl., 1888); *Hawarden v. Youghiogheny & L. Coal Co.*, 111 Wis. 545; 87 N. W. 472; 55 L. R. A. 828 (1901). For other instances, see §§ 25, 34, 62.

So in *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 744; 19 L. R. A. 387, 394 (C. C. Ohio, 1893), where the court said: "The interstate business of complainant will be interrupted and interfered with at every hour of the day and at every point within a radius of many miles." The case against the party seeking to enforce the rule was strengthened by the fact that, at the time he issued or was about to issue his order, the injunction under consideration in 54 Fed. 746; 19 L. R. A. 395 (see § 98), had issued. A notable decision under this head is *Barr v. Essex Trades Council*, 53 N. J. Eq.

101, 127; 30 Atl. 881, 890 (1894), where an injunction was allowed against the boycott of a daily newspaper by an extensive combination of labor unions. The court said: "Representations calculated to reduce the paper's circulation with the public, or to influence, by fear of loss of customers, the number or extent of advertisements, operate, not once for all, but, as it were, day by day, as the paper goes to and comes from the press, and each loss will be a distinctive cause of action. . . . When opposition through the agency of already-established organizations, reaching in their locality every part of the county, and in their membership almost every industry in prominent operation—comprising, in the territory in which the paper must look for its support, operatives of a purchasing power of \$400,000 a week, is put on foot,—when such an organization, not satisfied with its potential authority over its own members, appeals to the public to boycott the paper, to cease buying or advertising in it, with the significant suggestion that disregard of the appeal will bring upon such person the like opposition of the organizations—who can estimate or approximate the natural damage short of ruin? The legal remedy in this case thus not only involves multiplicity of suits, but the threatened damage seems irreparable." So the boycott of a newspaper was enjoined under similar conditions in *Matthews v. Shankland*, 25 Misc. 604; 56 N. Y. Suppl. 123 (Supm.

§ 96. Injunction against inducing breach of contract.¹⁵

§ 97. Injunction against quitting employment.—It being as a

Ct., Sp. T., 1898). So in *Casey v. Cincinnati Typographical Union*, 45 Fed. 135; 12 L. R. A. 193 (C. C. Ohio, 1891), it being held no defense that the representations of fact were true. On the other hand, in *Longshore Printing Co. v. Howell*, 26 Oreg. 527; 38 Pac. 547; 28 L. R. A. 464; 46 Am. St. Rep. 640 (1894), an injunction against a boycott by members of labor unions, of the business of "lithographing, engraving, printing and publishing journals, newspapers, etc.," was refused on the ground that there did not appear such threatened and imminent injuries to the plaintiff's business and property, as would result in its irreparable detriment and loss, while conceding that the defendant might be liable in an action at law or criminally. There were allegations of a conspiracy between the officers and members of the union to compel the plaintiff to submit to its dictation, upon pain of being boycotted; of entry on the plaintiff's premises and ordering union men to cease work under penalty of being dealt with according to the regulations of the union; that the plaintiff lost, and apprehended loss

of, important business through the willful and malicious acts of the defendant; of circulation of facts of the plaintiff's employees being called off and ordered to stop work, and the plaintiff's office left without hands, it not being shown how these facts were circulated, or to whom they were communicated; of posting the following notice in conspicuous places: "Owing to the Longshore Printing Company breaking the rules of the Multnomah Typographical Union, all members of the union were withdrawn March 16, 1893." The court said (26 Oreg. 552; 38 Pac. 555; 28 L. R. A. 475): "This may or may not have been detrimental to plaintiff's business, and would depend somewhat upon the state of siege existing at the time." So allegations of "secret assaults" upon the plaintiff, and of its patrons being "harassed" and "boycotted," were held insufficient as unaccompanied with statements of definite facts and circumstances. An injunction against a boycott was refused on the ground that the plaintiff did not come into court with clean hands, in *Sinsheimer v. United Garment Workers*, 77 Hun, 215; 28 N. Y. Suppl. 321

¹⁵ Injunctions against inducing breach of contract were allowed in, for instance, *Beekman v. Marsters*, 195 Mass. 205; 80 N. E. 817; 11 L. R. A. N. S. 201; 122 Am. St. Rep. 232 (1907); *Beattie v. Callanan*, 82 App. D. 7; 81 N. Y. Suppl. 413 (1903); *Lytle v. Galveston, H. & S. A. Ry. Co.*, 100 Tex. 292; 99 S. W. 396; 10 L. R. A. N. S. 437 (1907); *Iron Molders' Union v.*

Allis-Chalmers Co., 166 Fed. 45; (C. C. A., 7th C., 1908). So in *Chesapeake & O. Coal Agency Co. v. Fire Creek Coal, etc., Co.*, 119 Fed. 942 (C. C. W. Va., 1902), against preventing, by intimidation, persons from entering the employment of one who was thereby prevented from fulfilling contracts with the plaintiff. See also decisions cited in §§ 27 et seq., 35, 64. In

rule lawful, apart from contractual relations, to quit one's employment, an injunction against so quitting will not be granted.

(1894; see § 62); but see decision below in 5 Misc. 448; 26 N. Y. Suppl. 152 (1893). It was refused in *Sweeny v. Torrence*, 11 Pa. Co. Ct. 497 (1892); *Manufacturer's Outlet Co. v. Longley*, 20 R. I. 86; 37 Atl. 535 (1897), on the ground that the acts complained of were *past acts*.

In *Van der Plaat v. Undertakers'*, etc., Assoc., 70 N. J. Eq. 116; 62 Atl. 453 (1905), an injunction was denied, it not appearing that the complainant had any "established business to be subjected to a boycott."

As to necessity that injunction proceed against individual members of boycotting combination, see *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 453; 41 S. E. 553, 564; 57 L. R. A. 547, 559; 90 Am. St. Rep. 126 (1902). See also, as to injunctions against boycotts, *Lewin v. Welsbach Light Co.*, 81 Fed. 904 (C. C. Pa., 1897).

For form of order, see *Gray v. Building Trades Council*, 91 Minn. 171, 183; 97 N. W. 663, 667; 63 L. R. A. 753, 759; 103 Am. St. Rep. 477 (1903), where the injunction allowed was against "interfering with the business of the

plaintiffs by means of threats or intimidation of any kind or nature directed against the customers or prospective customers of said plaintiffs"; also against "interfering with the customers or prospective customers of plaintiffs by threats of any kind or nature." See also form of order in *Loewe v. California State Federation of Labor*, 139 Fed. 71 (C. C. Cal., 1905), which was applied in *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011 (C. C. Cal., 1905). See also *Buck's Stove and Range Co. v. American Federation of Labor*, 36 Wash. Law Rep. 822, 833 (Supm. Ct. D. C., 1908).

In *Foster v. Retail Clerks' Protective Assoc.*, 39 Misc. 48; 78 N. Y. Suppl. 860 (Supm. Ct., Sp. T., 1902), the injunction was allowed merely against illegal acts incident to the boycott.

See, on the general subject, articles in 33 Am. Law Rev. 885 (1899); 34 Id. 161, 468 (1900) by S. D. Thompson; 40 Am. Law Rev. 196 (1906) by J. W. Bryan.

For objection to injunction against boycott, based on constitutional guaranty of freedom of speech, see § 92.

Nashville, Chattanooga, etc., Ry. Co. v. McConnell, 82 Fed. 65, 71 (C. C. Tenn., 1897), an injunction was granted on the application of a railroad company, against the action of ticket-brokers in procuring the use by third persons of special contract tickets issued by the company, such use being in violation of the contract under which the tickets were issued, which confined such use to

the original purchasers. To like effect other decisions cited in § 27.

See also, as to injunction against inducing breach of contract, *Aberthaw Construction Co. v. Cameron*, 194 Mass. 208; 80 N. E. 478; 120 Am. St. Rep. 542 (1907); *Fleckenstein v. Fleckenstein*, 66 N. J. Eq. 252; 57 Atl. 1025 (1904); *Exchange Telegraph Co. v. Central News Co.*, 2 Ch. (1897) 48; *Sperry*,

And so, it would seem, even where such quitting is in violation of agreement.¹⁶

§ 98. **Injunction against strike.**—There being as a rule nothing unlawful in a mere strike, an injunction will not *ordinarily* be allowed against it,¹⁷ though it may be otherwise of a strike

etc., *Co. v. Mechanics' Clothing Co.*, 128 Fed. 800 (C. C. R. L., 1904); *Parkinson v. Building Trades Council*, 98 Pac. 1027, 1036 (Supm. Ct. Cal., 1908).

¹⁶ See *Miller v. Warner*, 42 App. D. 208; 59 N. Y. Suppl. 956 (1899); *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 110 (C. C. Neb., 1902); *Knudsen v. Benn*, 123 Fed. 636 (C. C. Minn., 1903).

¹⁷ This doctrine was declared with great emphasis in *Arthur v. Oakes*, 63 Fed. 310, 318; 11 C. C. A. 209, 218; 25 L. R. A. 414, 425 (7th C., 1894); modifying *Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co.*, 60 Fed. 803; 25 L. R. A. 414 (C. C. Wis., 1894). Here an injunction against employees of the receiver of a railroad restraining them from "so quitting the service of said receivers, with or without notice, as to cripple the property, or prevent or hinder the operation of said railroad," was refused, on the general ground that a court of equity will not by injunction prevent one individual from quitting the personal service of another. And this was held applicable though the employees were those of a railroad. The court said: "Undoubtedly the simultaneous cessation of work by any considerable number of the employees of a railroad corporation, without previous notice, will have an injurious effect, and for a time inconvenience the public. But these evils, great as they are, and although arising in many cases from

the inconsiderate conduct of employees and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employees and employers, so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance and safe management of public highways. In the absence of legislation to the contrary, the right of one in the service of a *quasi*-public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employee from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him against his will to remain in such service, or actually to perform the personal acts required in such employments, or compel such managers against their will to keep a particular employee in their service."

See also *Wabash R. Co. v. Hanahan*, 121 Fed. 563, 571 (C. C. Mo., 1903); *Mills v. U. S. Printing Co.*, 99 App. D. 605, 608; 91 N. Y. Suppl. 185, 187 (1904).

In *Reynolds v. Everett*, 144 N. Y. 189; 39 N. E. 72 (1894), the discretion of the court below was held properly exercised in refusing an injunction in favor of an employer against a strike, in the absence of elements of intimidation, especially as the acts complained of had been discontinued.

As to practical effect of prelimi-

that is in violation of an agreement.¹⁸ As already seen, however, a mere strike is, according to the prevailing view, not necessarily legal, and in this view an injunction against a strike may be allowable.¹⁹

§ 99. **Injunction against inducing to quit employment.**—As we have seen, it is the generally accepted doctrine that it is illegal to induce one to quit his employment.²⁰ Although it seems clear enough that such illegality does not of itself furnish sufficient ground for granting an injunction, injunctions against so inducing to quit have been rather freely granted.²¹

nary injunction in ending strike, see *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 Fed. 598, 603 (C. C. Ohio, 1898).

¹⁸ Thus, proceeding on the theory of an implied agreement not to quit employment under certain conditions (see § 48), in *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746; 19 L. R. A. 395 (C. C. Ohio, 1893), an injunction restraining railroad companies and their employees from refusing to extend to another railroad facilities for interchange of freight, was held violated by an engineer in the employ of one of the companies, in quitting his train on a main track ten miles from its destination. This is carrying the remedy to an extreme length, and goes far toward justifying the complaints against "government by injunction."

¹⁹ See § 57. Thus, in *Reynolds v. Davis*, 198 Mass. 294; 84 N. E. 457; 17 L. R. A. N. S. 162 (1908), an injunction was allowed to employers against "combining together to further" a strike against the open shop "and from doing any acts whatever, peaceful or otherwise, in furtherance thereof, including the payment of strike benefits and putting the plaintiffs on an unfair list."

See article in 42 Am. Law Rev. 200 (1908) by C. R. Darling.

²⁰ See § 65.

²¹ Such injunctions were allowed in *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49 (C. C. Tenn., 1901); *U. S. v. Weber*, 114 Fed. 950 (C. C. W. Va., 1902); *U. S. v. Haggerty*, 116 Fed. 510 (C. C. W. Va., 1902), and see *U. S. v. Gehr*, 116 Fed. 520 (C. C. W. Va., 1902). So in *Coons v. Chrystie*, 24 Misc. 296; 53 N. Y. Suppl. 668 (Supm. Ct., Sp. T., 1898); *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903). So in *Vegelahn v. Guntner*, 167 Mass. 92; 44 N. E. 1077; 35 L. R. A. 722; 57 Am. St. Rep. 443 (1896); *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509; 50 S. E. 353; 69 L. R. A. 90; 106 Am. St. Rep. 137 (1905), the acts enjoined included inducing to quit employment. See also decisions cited in §§ 65 et seq.

In *Frank v. Herold*, 63 N. J. Eq. 443; 52 Atl. 152 (1902), such an injunction was allowed under conditions, however, that were regarded as "infringing upon the private rights of the operatives and thereby preventing them against their

§ 100. Injunction against inducing not to enter employment.

—As we have seen, there is authority for the doctrine that it is illegal, at least under certain conditions, to induce one not to enter the employment of another. And injunctions against so inducing have been granted.²²

real wishes from continuing to work."

In *Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 744; 19 L. R. A. 387, 395 (C. C. Ohio, 1893), though the injunction was granted on the theory that the acts complained of constituted a boycott, rather than a strike or a quitting of employment (for facts, see § 60), yet the court said that an injunction might have been granted against "directing the engineers to quit work, for the purpose of coercing the defendant companies to violate the law and complainant's rights." An injunction in this form, however, was not asked for.

In *Reinecke Coal Mining Co. v. Wood*, 112 Fed. 477 (C. C. Ky., 1901), an injunction was allowed against acts including the maintenance of an armed camp near the place of employment, for the purpose of inducing the employees to join a certain labor organization and thereafter strike if a certain scale of wages were not adopted by the employers. The occupants of such camp "occasionally sallied forth to threaten and sometimes to do much worse to persons who refused to join their organization, and to those who refused to employ laborers who did join it."

In *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; 53 Atl. 230 (1902), an injunction was allowed against "in any manner knowingly and intentionally causing or

attempting to cause by threats, offers of money, payment of money, offering to pay or the payment of transportation expenses, inducements or persuasions to any employee of the complainant under contract to render service to it to break such contract by quitting such service."

²² Thus, in *Vegelahn v. Guntner*, 167 Mass. 92; 44 N. E. 1077; 35 L. R. A. 722; 57 Am. St. Rep. 443 (1896); *Blindell v. Hagan*, 54 Fed. 40 (C. C. La., 1893); affirmed in *Hagan v. Blindell*, 56 Fed. 696; 6 C. C. A. 86 (5th C., 1893); *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903).

See also decisions cited in § 66.

Compare, under English statute against "watching or besetting," *Lyons v. Wilkins*, 1 Ch. (1896) 811; see subsequent decision in 1 Ch. (1899) 255.

As to evidence of injury on application for injunction against intimidating from entering or remaining in employment, see *L. D. Willcut & Sons Co. v. Driscoll*, 200 Mass. 110, 113; 85 N. E. 897, 899 (1908). In *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; 53 Atl. 230 (1902), the injunction was against any "personal molestation of persons willing to be employed by complainant, with intent to coerce such persons to refrain from entering such employment; addressing persons willing to be employed by complainant, against their will and

§ 101. Injunction against preventing from securing or continuing in employment.²³

§ 102. Injunction against interference with receiver.—In some instances the allowance of an injunction has been based on the power to prevent interference with a receiver; thus where the decision was based on the general “power of a court of equity, having custody by receivers of the railroad and other property of a corporation, to enjoin combinations, conspiracies or acts upon the part of the receivers’ employees and their associates in labor organizations, which, if not restrained, would do irreparable mischief to such property, and prevent the receivers from discharging the duties imposed by law upon the corporation.”²⁴

§ 103. Injunction against unlawful acts of striking employees or those in sympathy with them.—In numerous instances injunctions have been granted against acts of striking employees, or, in some instances, of those in sympathy with them, thus, where it was said: “The threatened acts are such that their frequent occurrence might be expected, and to obtain legal redress therefor the annoyance of a multiplicity of suits would follow; also it is alleged that defendants are insolvent—both of

thereby causing them personal annoyance with a view to persuade them to refrain from such employment.”

²³ Injunctions against acts or the use of methods tending to prevent from securing employment or continuing in employment were allowed in, for instance, *Plant v. Woods*, 176 Mass. 492; 57 N. E. 1011; 51 L. R. A. 339; 79 Am. St. Rep. 330 (1900; see form of decree); *Pickett v. Walsh*, 192 Mass. 572; 78 N. E. 753; 6 L. R. A. N. S. 1067; 116 Am. St. Rep. 272 (1906); *Erdman v. Mitchell*, 207 Pa. St. 79; 56 Atl. 327; 63 L. R. A. 534; 99 Am. St. Rep. 783 (1903). See also decisions cited in c. IX.

²⁴ *Arthur v. Oakes*, 63 Fed. 310, 312; 11 C. C. A. 209, 211; 25 L. R. A. 414, 419 (7th C., 1894). So acts producing fear of violence upon the minds of employees of a railroad in the hands of a receiver, were held an unlawful interference with the management of the road and a contempt of court, in *Re Wabash R. Co.*, 24 Fed. 217 (C. C. Mo., 1885); *U. S. v. Kane*, 23 Fed. 748 (C. C. Colo., 1885). See also *Re Doolittle*, 23 Fed. 544 (C. C. Mo., 1885).

See, as to mining property in the hands of a receiver, *U. S. v. Weber*, 114 Fed. 950 (C. C. W. Va., 1902).

which are among the prime reasons that appeal to a court of equity for its preventive relief.”²⁵

²⁵ *Cœur D'Alene Consolidated, etc., Mining Co. v. Miners' Union*, 51 Fed. 260, 265; 19 L. R. A. 382, 385 (C. C. Idaho, 1892). Other instances of injunctions granted under such conditions are *Lake Erie & Western Ry. Co. v. Bailey*, 61 Fed. 494 (C. C. Ind., 1893); *U. S. v. Sweeney*, 95 Fed. 434, 439, 446 (C. C. Ark., 1899); *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49 (C. C. Tenn., 1901); *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. 264 (C. C. Ill., 1901); *Ex parte Richards*, 117 Fed. 658 (C. C. W. Va., 1902); *Carroll v. Chesapeake & O. Coal Agency Co.*, 124 Fed. 305; 61 C. C. A. 49 (4th C., 1903); *Gulf Bag Co. v. Suttner*, 124 Fed. 467 (C. C. Cal., 1903); *Christensen v. Kellogg Switchboard, etc., Co.*, 110 Ill. App. 61 (1903); *Christensen v. People*, 114 Ill. App. 40 (1904); affirmed as *O'Brien v. People*, 216 Ill. 354; 75 N. E. 108; 108 Am. St. Rep. 219 (1905); *Bruschke v. Furniture Makers' Union*, 18 Chicago Legal News, 306 (Super. Ct. Cook Co., 1886?); *Underhill v. Murphy*, 117 Ky. 640; 78 S. W. 482; 111 Am. St. Rep. 262 (1904); *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49; 46 Atl. 208 (1899); *George Jonas Glass Co. v. Glass Blowers' Assoc.*, 64 N. J. Eq. 640; 54 Atl. 565 (1903); *Beattie v. Callanan*, 67 App. D. 14; 73 N. Y. Suppl. 518 (1901); *Herzog v. Fitzgerald*, 74 App. D. 110; 77 N. Y. Suppl. 366 (1902); *Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903); *N. Y., Lake Erie & W. R. R. Co. v. Wenger*, 17

Weekly L. Bull. 306 (Cuyahoga Co., Ohio, Com. Pl., 1887); *Perkins v. Rogg*, 28 Id. 32 (Cin. Super. Ct., 1892); *Temple Iron Co. v. Carmanoskie*, 10 Kulp (Pa.), 37 (1900). See *Steicher v. Grogan*, 43 App. D. 213; 59 N. Y. Suppl. 1065 (1899).

In *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; 53 Atl. 230 (1902), the injunction was against “entering the premises of complainant against its will, with intent to interfere with its business; violence, threats of violence, insults, indecent talk, abusive epithets, practiced upon any persons without their consent, with intent to coerce them to refrain from entering the employment of complainant or to leave its employment.”

See also decisions cited in c. X.

For forms of orders enjoining such acts, see *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 Fed. 608 (C. C. Ohio, 1898); *U. S. v. Sweeney*, supra; *Southern Ry. Co. v. Machinists' Local Union*, supra; *Union Pac. R. Co. v. Ruef*, 120 Fed. 102, 129 (C. C. Neb., 1902); *Knudsen v. Benn*, 123 Fed. 636 (C. C. Minn., 1903).

For form of temporary injunction in *Wabash R. Co. v. Hannahan*, 121 Fed. 563 (C. C. Mo., 1903), see with comments, editorial note in 37 Am. Law Rev. 285 (1903).

In *Re Debs*, 158 U. S. 564, 598; 15 Supm. 900, 911; 39 L. Ed. 1092 (1895); affirming 64 Fed. 724, 765 (C. C. Ill., 1894) (see supra), the injunction was sustained on the ground of the right of the government to enjoin interference with interstate commerce. See § 8.

§ 104. Injunction against picketing or acts incident thereto.

—In several instances injunctions have been allowed against picketing²⁶ or acts incident thereto.²⁷

²⁶ Thus, even in the absence of proof of violence, in *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 520; 77 N. W. 13, 22; 42 L. R. A. 407, 416; 74 Am. St. Rep. 421 (1898); *Otis Steel Co. v. Local Union*, 110 Fed. 698 (C. C. Ohio, 1901). See also *Knudsen v. Benn*, 123 Fed. 636 (C. C. Minn., 1903); *Atchison, T. & S. F. Ry. Co. v. Gee*, 139 Fed. 582 (C. C. Iowa, 1905); *Vegelahn v. Guntner*, 167 Mass. 92; 44 N. E. 1077; 35 L. R. A. 722; 57 Am. St. Rep. 443 (1896). See also § 85. But mere picketing, in the absence of coercion, was regarded as insufficient ground for an injunction in *Rogers v. Evarts*, 17 N. Y. Suppl. 264 (Supm. Ct., Sp. T., 1891); so, for a preliminary injunction, in *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, 59 N. J. Eq. 49; 46 Atl. 208 (1899); *Mills v. U. S. Printing Co.*, 99 App. D. 605, 609; 91 N. Y. Suppl. 185, 187 (1904); *Butterick Publishing Co. v. Typographical Union No. 6*, 50 Misc. 1; 100 N. Y. Suppl. 292 (Supm. Ct., Sp. T., 1906); *Krebs v. Rosenstein*, 31 Misc. 661; 66 N. Y. Suppl. 42 (1900); affirmed in *Kerbs v. Rosenstein*, 56 App. D. 619; 67 N. Y. Suppl. 385 (1900); see *Levy v. Rosenstein*, 66 N. Y. Suppl. 101 (1900); affirmed in 55 App. D. 618; 67 N. Y. Suppl. 630 (1900); also *Winslow v. Building Trades Council* (Case & Comment, Aug., 1899), cited in *Cumberland Glass Manuf. Co. v. Glass Bottle Blowers' Assoc.*, supra. See also § 85.

As to allowing permanent injunction "after the troubles which called it out in its interlocutory form, and which are the substance of the allegations of the bill on which it issued, are wholly over," see *Piano & Organ Workers' Union v. Piano and Organ Supply Co.*, 124 Ill. App. 353 (1906).

In *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759; 53 Atl. 230 (1902), an injunction was allowed against "loitering or picketing in the streets near the premises of complainant, with intent to procure the personal molestation and annoyance of persons employed or willing to be employed by complainant, and with a view to cause persons so employed to quit their employment, or persons willing to be employed by complainant to refrain from such employment."

As to requisites of complaint, see *Badger Brass Manuf. Co. v. Daly*, 119 N. W. 328 (Supm. Ct. Wis., 1909).

²⁷ Thus acts producing fear of injury, in *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 Fed. 608 (C. C. Ohio, 1898); *Southern Ry. Co. v. Machinists' Local Union*, 111 Fed. 49 (C. C. Tenn., 1901); *Allis Chalmers Co. v. Reliable Lodge*, 111 Fed. 264 (C. C. Ill., 1901); *Pope Motor Car Co. v. Keegan*, 150 Fed. 148 (C. C. Ohio, 1906); *Butterick Publishing Co. v. Typographical Union No. 6*, 50 Misc. 1; 100 N. Y. Suppl. 292 (Supm. Ct., Sp. T., 1906); *Beaton v. Tarrant*, 102 Ill. App. 124 (1902); *Christensen v. Kellogg*

§ 105. Injunction against blacklisting.²⁸

Switchboard, etc., Co., 110 Ill. App. 61 (1903); Christensen v. People, 114 Ill. App. 40, 61 (1904); Davis Machine Co. v. Robinson, 41 Misc. 329; 84 N. Y. Suppl. 837 (Supm. Ct., Sp. T., 1903). See also Krug Furniture Co. v. Berlin Union, 5 Ont. Law Rep. 463 (1903). See also § 86.

In *Goldberg v. Stablemen's Union*, 149 Cal. 429; 86 Pac. 806; 8 L. R. A. N. S. 460; 117 Am. St. Rep. 145 (1906), the injunction allowed was against "causing any agent or agents, representative or representatives, or any picket or pickets, or any person or persons to be stationed in front of or in the immediate vicinity of said (plaintiff's) places of business, with a placard or transparency having on it the words and figures ("Unfair firm; reduced wages of employees

50c per day. Please don't patronize") or any placard or transparency (having words or figures) of similar import, and from, at said places of business, or in front thereof, or in the immediate vicinity thereof, by means of pickets or transparencies, or otherwise, threatening or intimidating any person or persons transacting or desiring to transact business with said plaintiff, or being employed at said place or places by the plaintiff."

²⁸ In *Worthington v. Waring*, 157 Mass. 421; 32 N. E. 744; 20 L. R. A. 342; 34 Am. St. Rep. 294 (1892), an injunction against the *blacklisting* of employees was refused; but see explanation of the decision in 20 L. R. A. 342, note.

See, generally, as to blacklisting, § 43.

PART II.

COMBINATIONS PRODUCING PUBLIC INJURY

CHAPTER XII

THE DOCTRINE OF PUBLIC POLICY

§ 106. The doctrine of public policy.

107. Application of doctrine to restrictions upon competition.

§ 106. **The doctrine of public policy.**—The wrongs hitherto considered have been wrongs that the law regards as committed merely against an individual. But we pass now to a consideration of wrongs that the law regards as far more extensive in their operation, namely, as committed not merely against an individual, but against a large number of individuals, constituting that vague combination known as “the public,” that is to say, the inhabitants of a given town, city, State or country, as the case may be, or even of a region not limited by mere political boundaries. The needs and capacities of different individuals are so infinite in their variety that a wrong measured by the needs and capacities of a large number must, of necessity, be somewhat indeterminate in its character, to say nothing of the indefiniteness of the number affected. Hence, it is not surprising that so indeterminate a test of liability has at times encountered strong disapproval.¹ Nevertheless it is a

¹ Such disapproval is manifested in the frequent quotation of the remark of Burrough, J., in *Richardson v. Mellish*, 2 Bingham, 229, 252 (1824), that “public policy is a very unruly horse.” See, for instance, *Chappel v. Brockway*, 21 Wend. (N. Y.) 157, 164 (1839).

For criticisms of the doctrine, see remarks of Campbell, C. J., in *Hilton v. Eckersley*, 6 El. & Bl. 47, 64 (1855); also *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, 136; 56 Am. Dec. 164, 168 (1851).

In *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223, 231; 55 N. W. 1119,

test that we must regard as, for the present at least, firmly established in our jurisprudence.² A wrong of this character is commonly known as an act against *public policy*. Any defini-

1120; 21 L. R. A. 337, 339; 40 Am. St. Rep. 319 (1893), it was said: "There is perhaps danger that, influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they (the courts) may be led to transcend the limits of their jurisdiction, and, like the court of King's Bench, in *Bagg's Case*, 11 Coke, 98a (1615), assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, as Lord Ellsmere puts it, 'to manage the State.'"

² In *Bishop v. Palmer*, 146 Mass. 469; 16 N. E. 299; 4 Am. St. Rep. 339 (1888), the invalidity of contracts in restraint of trade was said to rest on the same ground "as if such contracts were forbidden by positive statute." That the court will raise the question that a contract is illegal as against public policy, though it has not been raised by the parties, see *Wright v. Cudahy*, 168 Ill. 86; 48 N. E. 39 (1897); *Richardson v. Buhl*, 77 Mich. 632, 656; 43 N. W. 1102, 1110; 6 L. R. A. 457, 465 (1889); *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103, 117; 96 N. W. 1, 6 (1903). So, even on appeal, *Pasteur Vaccine Co. v. Burke*, 22 Tex. Civ. App. 232; 54 S. W. 804 (1899). But an appellate court should not consider the objection, raised for the first time on appeal, unless such illegality appear from the pleadings, the face of the contract, or the confessed facts of the case. *Carter-Crume Co. v. Peur-*

rung, 86 Fed. 439; 30 C. C. A. 174 (6th C., 1898). The rule that the question whether an agreement is contrary to public policy, is *one of law* for the court has been applied to agreements in restriction upon competition. Thus, in *Cummings v. Union Blue Stone Co.*, 15 App. D. 602; 44 N. Y. Suppl. 787 (1897); affirmed in 164 N. Y. 401; 58 N. E. 525; 52 L. R. A. 262; 79 Am. St. Rep. 655 (1900, holding a request to go to the jury properly denied). So in *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, 135; 56 Am. Dec. 164, 167 (1851), holding that, in an action on an agreement, judgment for the defendant on demurrer to the plea was not made proper by mere averments in the plea to the effect that the agreement tended to stifle competition, etc. The court said: "No averment could give to the agreement a character which it had not, and no admission could take from it the character which it had." To similar effect, *Hoffman v. Brooks*, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cin., 1884). But in *South Florida R. R. Co. v. Rhodes*, 25 Fla. 40, 46; 5 So. 633, 635; 3 L. R. A. 733, 737; 23 Am. St. Rep. 506 (1889), the question whether an agreement was "*bona fide* and not entered into for the purpose of an oppressive monopoly" was held a mixed one of law and fact, and for the jury. See, as to pleading defense to contract valid on its face as alleged and proved by the plaintiff, *Drake v. Siebold*, 81 Hun, 178; 30 N. Y. Suppl. 697 (1894).

tion of such an act would seem to be of necessity unsatisfactory,³ and, without attempting to frame one, we content ourselves with the suggestion that an act illegal as against public policy involves, as an essential element, the idea of a wrong committed against a considerable number of persons, such number being commonly incapable of precise determination. It is important to note that so different are the conditions of existence, comparing one time or country with another, that an act, illegal as against public policy, under the conditions of a given time and country, may not be so under the conditions of another.⁴ Hence, in applying this test of liability, precedents

³ It was said by Kekewich, J., in *Davies v. Davies*, 36 Ch. D. 359, 364 (1887), that "public policy does not admit of definition." But in *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268, 294; 22 N. E. 798, 803; 8 L. R. A. 497, 505; 17 Am. St. Rep. 319 (1889), public policy was defined as "that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." See also *Greenhood on Public Policy*, p. 2. By Cal. Civil Code, § 1667, which has been copied in several other jurisdictions, "that is not lawful which is contrary to the policy of express law, although not expressly prohibited."

⁴ Thus, it was said in *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. 58, 68; 7 C. C. A. 15, 72; 24 L. R. A. 73, 82 (8th C., 1893), with reference to public policy in connection with contracts in restraint of trade: "Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century

ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph, while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassable ocean. . . . It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that we have now to deal. In considering that subject we are not to be governed by our own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its constitution, laws and judicial decisions. So far as they disclose it, it is our province to learn and en-

based on different conditions of time and place should be employed with great caution.⁵ So, too, the lack of precedents furnishes no sufficient ground for refusal to pronounce illegal, acts performed under radically new conditions of time and place, and, as will hereafter be seen, this statement is peculiarly applicable to the development of the doctrine against restrictions upon competition resulting from the acts of individuals. Obviously the public policy of a given jurisdiction may be determined by the legislative power, subject to constitutional restriction, if any.⁶

§ 107. **Application of doctrine to restrictions upon competition.**—The combinations presently to be considered are such as produce or tend to produce restrictions upon competition. Whatever be the specific ground on which such restrictions are held to be illegal, the underlying ground will be found to be that they are against public policy. There is authority, however, for saying that it is with reluctance that the doctrine of public policy will be applied for the purpose of condemning such restrictions.⁷

force it; beyond that it is unnecessary and unwise to pursue our inquiries." See also *Davies v. Davies*, 36 Ch. D. 359 (1887).

⁵ This is peculiarly applicable to precedents concerning the validity of contracts in restraint of trade. See note 4, *supra*; also, *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, App. Cas. (1894), 535, 553; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 13 N. E. 419; 60 Am. Rep. 464 (1887).

⁶ *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268, 296; 22 N. E. 798, 804; 8 L. R. A. 497, 506; 17 Am. St. Rep. 319 (1889).

⁷ In *Ives v. Smith*, 3 N. Y. Suppl. 645, 653; affirmed in 8 Id. 46 (Supm. Ct., Gen. T., 1889), where were sustained traffic contracts between railroad companies, the court said: "A court should not stamp with invalidity contracts which have ex-

isted for years, and under which rights have been created and obligations assumed, without the clearest conviction that they come within the condemned or illegal class. The avoidance of contracts on the ground that they are against public policy, is reluctantly ordered by the courts." Compare the frequently quoted remarks of Jessel, M. R., in *Printing & Numerical Registering Co. v. Sampson*, 19 L. R. Eq. Cas. 462 (1875), that "if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice." See article in 13 Harv. Law Rev. 198, 265, 277 (1899-1900) by E. Q. Keasbey.

CHAPTER XIII

RESTRICTION UPON COMPETITION AS RESULTING FROM ACT OF GOVERNMENT

- § 108. Restriction upon competition as resulting from act of government.
- 109. Monopoly as resulting from act of government.
- 110. Monopoly as exclusive of new right or franchise not previously possessed by community at large.
- 111. Restriction created in exercise of police power.
- 112. Right under patent.
- 113. Constitutional restrictions upon power of legislature to create monopolies.
- 114. Monopoly as resulting from act of municipal corporation.

§ 108. **Restriction upon competition as resulting from act of government.**—Competition has been defined as “the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time; common contest or striving for the same object.”¹ As applied to competition in trade, it is, generally speaking, the action of two or more traders in seeking at the same time to deal with the same customer. The existence of a restriction upon competition implies diminution of competition, or, at least, a tendency to such diminution. Thus, if there have previously been three traders seeking at the same time to deal with the same customer, whatever causes the number of such competing traders to be reduced from three to two results in a diminution of competition. If the number be so reduced to one, there is a complete restriction upon competition; that is to say, a destruction of competition. Until within a comparatively recent period a complete or an approximately complete restriction upon competition has usually been the result, not of the acts of mere individuals, but of a grant, that is,

¹ Century Dictionary.

the act of government, conferring upon a single individual or set of individuals the exclusive right of buying or selling a given article within a given area.

§ 109. **Monopoly as resulting from act of government.**—Restriction upon competition resulting from an act of government, as distinguished from the acts of individuals, has commonly taken the form of what has been known as a monopoly, which, “in its original sense, was an exclusive right granted by the State to one or a few of something which was before of common right.”² Thus a monopoly has been defined as a “license or privilege allowed *by the king* for the sole buying and selling, making, working or using of anything whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading *which he had before*.”³ So as “an institution *by the king*, by his grant, commission or otherwise to any persons or corporations of or for the sole buying, selling, making, working or using of everything, whereby any persons or corporations are sought to be restrained of any freedom or liberty *they had before*, or hindered in their lawful trade.”⁴ In England the power of creating monopolies was, as indicated in the above quoted definitions, for a long time in the crown, but was so abused by the appointing power that, by virtue of statute, it is

² *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 520; 56 S. E. 264, 269; 10 L. R. A. N. S. 268, 280; 116 Am. St. Rep. 901 (1907).

³ 4 Blackstone's Commentaries, p. 159.

⁴ Dissenting opinion of Story, J., in *Charles River Bridge v. Warren Bridge*, 11 Peters (U. S.), 420, 607; 9 L. Ed. 773 (1837), citing *East India Co. v. Sandys*, 10 Howell's State Trials, 371, 386, 425 (1684).

To the same effect, *City of Memphis v. Memphis Water Co.*, 5 Heisk. (Tenn.) 495, 529 (1871); *Leeper v. State*, 103 Tenn. 500, 514; 53 S. W. 962, 964; 48 L. R. A. 167, 170

(1899). See also *Darcy v. Allein*, 11 Coke, 84b (1602); *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 9; 15 Supm. 249, 252; 39 L. Ed. 325 (1895); *Re Charge to Grand Jury*, 151 Fed. 834 (D. C. Ga., 1907); *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham Street Ry. Co.*, 79 Ala. 465; 58 Am. Rep. 615 (1885); *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611; 40 S. E. 591; 56 L. R. A. 804; 88 Am. St. Rep. 895 (1902); 3 Coke's Inst. 181; *Hawkins' Pleas of the Crown*, c. 79; *Eddy on Combinations*, §§ 29–33; article in 33 Am. Law Rev. 499 (1899) by Lionel Norman.

now solely in Parliament.⁵ Similarly in this country the power is in the legislatures,⁶ subject to such constitutional restrictions as exist.⁷ Legislative grants creating monopolies are strictly construed.⁸

§ 110. **Monopoly as exclusive of new right or franchise not previously possessed by community at large.**—It will be noted from the definitions already given that the legal conception of a monopoly, as resulting from an act of government, is confined

⁵ By 21 Jas. 1, c. 3 (1624), declaring that all monopolies, grants, letters patent, etc., for the "sole buying, selling, making, working or using of anything" should be void. But there had been much earlier legislation directed against monopolies. See 9 Edw. 3, c. 1 (1335), cited in *Darcy v. Allein*, *infra*. As is said by Blackstone (4 Commentaries, p. 159), such monopolies "had been carried to an enormous height during the reign of Queen Elizabeth." For a vivid characterization of the evils leading to the popular agitation in England against monopolies about the beginning of the seventeenth century, see argument of counsel in the *Slaughter-House Cases*, *infra* (pp. 45-48), and quotation therein from Macaulay's *History of England*. See also *Re Charge to Grand Jury*, *supra*. Such monopolies had previously to the act of 1624, however, been declared illegal on common-law grounds, thus, in the "Case of Monopolies" (*Darcy v. Allein*), 11 Coke, 84b (1602), where a grant by the crown of the exclusive right to make cards within the realm was held void as "a monopoly and against the common law." See *Hawkins' Pleas of the Crown*, c. 79; *Eddy on Combinations*, § 6; article in 6 Mich. Law Rev. 1 (1907) by S. T. Miller.

⁶ *Slaughter-House Cases*, 16 Wall. 36, 66; 21 L. Ed. 394 (1873); *Stewart v. Erie & Western Transp. Co.*, 17 Minn. 372, 395 (1871); *Bancroft v. Thayer*, 5 Sawyer, 502; 2 Fed. Cas. No. 835 (1879).

Control of liquor traffic by the State itself was held not objectionable as a monopoly, in *Guy v. Commissioners of Cumberland Co.*, 122 N. C. 471; 29 S. E. 771 (1898).

As to power of municipal corporations, see § 114.

⁷ See § 113.

⁸ See, for instance, *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. 529, 535 (C. C. Mich., 1886); *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 30 Fed. 324 (C. C. Neb., 1887); *Interstate Stockyards Co. v. Indianapolis Union Ry. Co.*, 99 Fed. 472, 482 (C. C. Ind., 1900); *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.*, 8 Del. Ch. 468, 511; 46 Atl. 12, 22 (1900); *Capital City Light & Fuel Co. v. City of Tallahassee*, 42 Fla. 462; 28 So. 810 (1900); *State ex rel. v. Cincinnati Gas-Light & Coke Co.*, 18 Ohio St. 262, 293 (1868); *Appeal of Scranton Electric Light & Heat Co.*, 122 Pa. St. 154; 15 Atl. 446; 1 L. R. A. 285; 9 Am. St. Rep. 79 (1888); *Brummett v. Ogden Waterworks Co.*, 93 Pac. 828, 833 (Supm. Ct. Utah, 1908).

to such monopolies as result from the absorption by one individual or set of individuals of a right previously possessed by the community at large, and does not include the vesting in such individual or set of individuals of a new right not previously possessed by the community at large.⁹ Thus the legal conception of a monopoly has been held not to include the grant of an exclusive ferry franchise;¹⁰ so of a grant of the right to supply gas¹¹ or water¹² to a municipality.

⁹ See § 109; dissenting opinion of Story, J., in *Charles River Bridge v. Warren Bridge*, 11 Peters (U. S.), 420, 607; 9 L. Ed. 773 (1837); also *Taylor v. Montreal Harbour Commissioners*, 17 Rap. Jud. de Quebec, 275, 286 (1899); 1 Tiedeman's State and Federal Control of Persons and Property, § 128.

¹⁰ *Patterson v. Wollmann*, 5 N. D. 608; 67 N. W. 1040; 33 L. R. A. 536 (1896; so, notwithstanding constitutional prohibition against grant to any citizen of "privileges or immunities which upon the same terms shall not be granted to all citizens"); *City of Laredo v. International Bridge & Tramway Co.*, 66 Fed. 246; 14 C. C. A. 1 (5th C., 1895), where, however, the court fell into considerable confusion, through failure to apply the definition of a monopoly as above given.

¹¹ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 659; 6 Supm. 252, 256; 29 L. Ed. 516 (1885); *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138, 147 (1875); *State v. Milwaukee Gas Light Co.*, 29 Wis. 454; 9 Am. Rep. 598 (1872); but see *Norwich Gas-Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, 38 (1856). Compare *Baily v. City of Philadelphia*, 184 Pa. St. 594, 605; 39 Atl. 494, 496; 39 L. R. A. 837, 841; 63 Am. St. Rep. 812 (1898).

See as to grant of right to supply light by electricity, *City of Denver v. Hubbard*, 17 Colo. App. 346; 68 Pac. 993 (1902).

¹² *New Orleans Water-works Co. v. Rivers*, 115 U. S. 674, 681; 6 Supm. 273, 276; 29 L. Ed. 525 (1885); *Bartholomew v. City of Austin*, 85 Fed. 359; 29 C. C. A. 568 (5th C., 1898); *City of Memphis v. Memphis Water Co.*, 5 Heisk. (Tenn.) 495, 529 (1871).

See *City of Brenham v. Brenham Water Co.*, 67 Tex. 542; 4 S. W. 143 (1887); *Altgelt v. City of San Antonio*, 81 Tex. 436; 17 S. W. 75; 13 L. R. A. 383 (1891); *Edwards County v. Jennings*, 89 Tex. 618; 35 S. W. 1053 (1896); *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 6; 77 C. C. A. 267, 272; 12 L. R. A. N. S. 736, 739 (8th C., 1906). In *Thrift v. Elizabeth City*, 122 N. C. 31; 30 S. E. 349; 44 L. R. A. 427 (1898), under a constitutional prohibition against "monopoly," such a grant by a municipal corporation was held void, it being intimated that the same would have been held even as to a grant expressly authorized by statute. To like effect *Hartford Fire Ins. Co. v. City of Houston*, 110 S. W. 973 (Tex. Civ. App., 1908); reversed on another point in 116 S. W. 36 (Supm. Ct. Tex., 1909).

§ 111. **Restriction created in exercise of police power.**—The authority of a legislature to create restrictions by way of exercise of the police power is well established,¹³ though such exercise must be limited to measures designed to promote the public health, morals or safety, or otherwise the public welfare.¹⁴ A restriction created in the exercise of such power is not, ordinarily at least, open to objection as a monopoly, even in view of a constitutional restriction upon the power to create a monopoly,¹⁵ thus a prohibition against the grant of "any special or exclusive privilege."¹⁶ Accordingly there have been sustained statutes requiring certain qualifications as a condition of the right to practice a certain trade or profession;¹⁷ so statutes providing for exclusive use of certain school text-books;¹⁸ so grants by municipalities of the exclusive

¹³ *Noel v. People*, 187 Ill. 587, 593; 58 N. E. 616, 618; 52 L. R. A. 287, 289; 79 Am. St. Rep. 238 (1900).

¹⁴ *California Reduction Co. v. Sanitary Reduction Works*, *infra*; *Noel v. People*, *supra*.

¹⁵ See, for instance, *State v. Call*, 121 N. C. 643; 28 S. E. 517 (1897); *Jannin v. State*, 42 Tex. Crim. App. 631; 51 S. W. 1126; 53 L. R. A. 349; 96 Am. St. Rep. 821 (1899); also 2 Hare's American Constitutional Law, p. 779.

¹⁶ See *infra*.

¹⁷ Thus of a provision for examination and license of medical practitioners. *Matter of Campbell*, 197 Pa. St. 581; 47 Atl. 860 (1901). So for obtaining by barber of certificate of registration. *State v. Zeno*, 79 Minn. 80; 81 N. W. 748; 48 L. R. A. 88; 79 Am. St. Rep. 422 (1900). Otherwise, however, of a statute limiting to registered pharmacists the right to sell patent and proprietary medicines at retail, but without requiring of them to make any inspection or examination of the

same, *Noel v. People*, *supra*. To similar effect, *State v. Donaldson*, 41 Minn. 74; 42 N. W. 781 (1889). As to creation of monopoly of business of keeping sailors' boarding houses, see *White v. Holman*, 44 Oreg. 180; 74 Pac. 933 (1904). As to requirement of length of residence in same locality as qualification for practice of medicine, see *State v. Baer*, 112 Iowa, 466; 84 N. W. 532; 51 L. R. A. 776 (1900). Compare *State v. Pennoyer*, 65 N. H. 113; 18 Atl. 878; 5 L. R. A. 709 (1889); *State v. Hinman*, 65 N. H. 103; 18 Atl. 194; 23 Am. St. Rep. 22 (1889).

¹⁸ *Leeper v. State*, 103 Tenn. 500; 53 S. W. 962; 48 L. R. A. 167 (1899); *Rand v. Hartranft*, 29 Wash. 591, 598; 70 Pac. 77, 79 (1902); *Dickinson v. Cunningham*, 140 Ala. 527; 37 So. 345 (1904). In *Leeper v. State*, however, it was (103 Tenn. 516; 53 S. W. 965; 48 L. R. A. 170) regarded as immaterial whether the statute derived validity from the police power, or the public character of the schools.

privilege of removing garbage;¹⁹ so statutes denying to individuals the right of sale of intoxicating liquors, and confining such right to public officials acting as such.²⁰

§ 112. **Right under patent.**—It may perhaps be doubted whether the definition of a monopoly as already stated includes patents granted to an inventor or discoverer. However this may be on common-law principles, the legality of such patents has long been declared by statute.²¹ And, as a general rule, the doctrine against monopolies does not render illegal restrictions imposed in granting a license. Thus it has been said:²² "The

¹⁹ Thus, in *City of Grand Rapids v. De Vries*, 123 Mich. 570; 82 N. W. 269 (1900); *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 29; 61 C. C. A. 91 (9th C., 1903; see numerous decisions cited); *State v. Robb*, 100 Me. 180; 60 Atl. 874 (1905). Otherwise, however, of the privilege of removing substances that are not per se nuisances, e. g., rubbish, ashes and manure. *Iler v. Ross*, 64 Neb. 710; 90 N. W. 869; 57 L. R. A. 895; 97 Am. St. Rep. 676 (1902).

See *Dreyfus v. Boone*, 114 S. W. 718 (Supm. Ct. Ark., 1908); *Re Lowe*, 54 Kan. 757; 39 Pac. 710; 27 L. R. A. 545 (1895); *State v. Hill*, 126 N. C. 1139; 36 S. E. 326; 50 L. R. A. 473 (1900); *People v. Gardner*, 143 Mich. 104; 106 N. W. 541 (1906); previous decision in 136 Mich. 693; 100 N. W. 126 (1904); affirmed in *Gardner v. Michigan*, 199 U. S. 325; 26 Supm. 106; 50 L. Ed. 212 (1905).

²⁰ *Plumb v. Christie*, 103 Ga. 686; 30 S. E. 759; 42 L. R. A. 181 (1898).

²¹ 21 Jas. 1, c. 3, § 5 (1624), saving from the operation of the act "any letters patents and grants of privilege for the term of fourteen years or under, hereafter to be

made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use, so as also they be not contrary to the law nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient." By art. 1, § 8, of the Federal constitution, Congress has exclusive power "to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Laws have been enacted to carry this provision into effect.

See *Bement v. National Harrow Co.*, 186 U. S. 70, 80; 22 Supm. 747, 751; 46 L. Ed. 1058 (1902); *General Electric Co. v. Wise*, 119 Fed. 922 (C. C. N. Y., 1903).

²² *Bement v. National Harrow Co.*, supra (186 U. S. 91; 22 Supm. 755). Here were sustained provisions relating to price, to manufacture and sale by the licensee, and to granting of other licenses by the licensor. It also appeared that the execution of the agreements embod-

general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal." Nevertheless, in case of such a grant to one engaged in what has been regarded as a business of a "public character," such restrictions have been held illegal as interfering with the performance of the duty of the grantee to the public.²³ And while the legality of a patent

ied in the licenses settled a large amount of litigation regarding the validity of many patents. This decision was applied under like conditions in *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364; 61 C. C. A. 334 (9th C., 1903); *National Phonograph Co. v. Schlegel*, 128 Fed. 733; 64 C. C. A. 594 (8th C., 1904).

See also *Fair v. Dover Manuf. Co.*, 166 Fed. 117 (C. C. A., 7th C., 1908).

So in *Murphy v. Christian Press Assoc. Publishing Co.*, 38 App. D. 426; 56 N. Y. Suppl. 597 (1899), was sustained a provision in an agreement conferring the right to publish a copyrighted book, to the effect that the book should not be sold for less than a stipulated price, the case of a combination being distinguished. So of provision in contract for sale of proprietary medicines, *Miles Medical Co. v. Platt*, 142 Fed. 606 (C. C. Ill., 1906); *Miles Medical Co. v. Jaynes Drug Co.*, 149 Fed. 838 (C. C. Mass., 1906; so held against objection that Federal anti-trust act was applica-

ble). To the contrary seems *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24; 82 C. C. A. 158; 12 L. R. A. N. S. 135 (6th C., 1907); on appeal from *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358, 386 (C. C. Ky., 1906); *Miles Medical Co. v. Park*, 164 Fed. 803 (C. C. A., 6th C., 1908).

See also *Garst v. Harris*, 177 Mass. 72; 58 N. E. 174 (1900); *Straus v. American Publishers' Assoc.*, 177 N. Y. 473; 69 N. E. 1107; 64 L. R. A. 701; 101 Am. St. Rep. 819 (1904); 193 N. Y. 496; 86 N. E. 525 (1908); *Cortelyou v. Johnson*, 138 Fed. 110 (C. C. N. Y., 1905); *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 179, 190 (C. C. N. Y., 1905).

²³ Thus, of grants of the right to use instruments covered by telephone patents. *State ex rel. v. Bell Telephone Co.*, 36 Ohio St. 296; 38 Am. Rep. 583 (1880); *Commercial Union Telegraph Co. v. New England Telephone, etc., Co.*, 61 Vt. 241; 17 Atl. 1071; 5 L. R. A. 161; 15 Am. St. Rep. 893 (1888). But a similar restriction was sustained

and the rights incident thereto are not, necessarily at least, affected by the circumstance of the owner of the patent being a party to an agreement with the owners of other patents in restriction upon competition,²⁴ yet, as will hereafter be seen,²⁵ it is, or may be, a distinct question whether the monopoly enjoyed by the owner of a patent prevents the application to combinations among such owners, of the rules applicable generally to restrictions upon competition.

§ 113. **Constitutional restrictions upon power of legislature to create monopolies.**—The better view would seem to be that in the absence of constitutional restriction, there is no limitation upon the power of the legislature to create a monopoly.²⁶ In nearly all the States, however, have been established constitutional prohibitions against granting special or exclusive privileges.²⁷

in *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn. 352; 44 Am. Rep. 237 (1881).

²⁴ *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 53 Fed. 592; 3 C. C. A. 605 (2d C., 1892).

²⁵ See § 148 and dissenting opinion in *Park v. National Wholesale Druggists' Assoc.*, 175 N. Y. 1, 43; 67 N. E. 136, 157; 62 L. R. A. 632, 650; 96 Am. St. Rep. 578 (1903). See under *Tex.* (§ 232) as to owner or lessee of patent.

²⁶ In *Norwich Gas-Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, 38 (1856), a monopoly created by legislative grant was held illegal, even in the absence of constitutional restriction. Compare *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 126; 51 N. E. 1006, 1009; 43 L. R. A. 264, 269; 68 Am. St. Rep. 763 (1898); *Thrift v. Elizabeth City*, 122 N. C. 31; 30 S. E. 349; 44 L. R. A. 427 (1898).

See, however, *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. 529, 535 (C. C. Mich., 1886).

²⁷ See *Stimson's American Statute Law*, § 17; *Skinner v. Garnett Gold-Mining Co.*, 96 Fed. 735 (C. C. Cal., 1899); *Interstate Stockyards Co. v. Indianapolis N. Ry. Co.*, 99 Fed. 472, 482 (C. C. Ind., 1900); *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 6; 77 C. C. A. 267, 272; 12 L. R. A. N. S. 736, 739 (8th C., 1906); *Ex parte Gerino*, 143 Cal. 412; 77 Pac. 166; 66 L. R. A. 249 (1904); *Johnson v. Good-year Mining Co.*, 127 Cal. 4; 59 Pac. 304; 47 L. R. A. 338; 78 Am. St. Rep. 17 (1899); *Starr Burying Ground Assoc. v. North Lane Cemetery Assoc.*, 77 Conn. 83, 90; 58 Atl. 467, 470 (1904); *N. Y., New Haven & Hartford R. R. Co. v. Offield*, 77 Conn. 417; 59 Atl. 510 (1904); *People ex rel. v. Clean Street Co.*, 225 Ill. 470; 80 N. E. 298; 9 L. R. A. N. S. 455; 116 Am. St. Rep. 156 (1907); *Dunbar v. American Tel. & Tel. Co.*, 87 N. E. 521, 533 (Supm. Ct. Ill., 1909); *Zumpfe v. Gentry*, 153 Ind. 219; 54 N. E. 805 (1899); *Matter of*

§ 114. **Monopoly as resulting from act of municipal corporation.**—The power of creating a monopoly is not possessed by a

Flukes, 157 Mo. 125; 57 S. W. 545; 51 L. R. A. 176; 80 Am. St. Rep. 619 (1900); *Farmers' Canal Co. v. Frank*, 72 Neb. 136; 100 N. W. 286, 293 (1904); *Matter of Union Ferry Co.*, 98 N. Y. 139 (1885); *Thousand Island Park Assoc. v. Tucker*, 173 N. Y. 203, 210; 65 N. E. 975, 976; 60 L. R. A. 786, 789 (1903); *City of Brooklyn v. Nassau Electric R. R. Co.*, 44 App. D. 462; 61 N. Y. Suppl. 33 (1899); *Territory v. De Wolfe*, 13 Okla. 454; 74 Pac. 98 (1903); *State ex rel. v. Frazier*, 36 Oreg. 178; 59 Pac. 5 (1899); *Supreme Lodge United Benevolent Assoc. v. Johnson*, 98 Tex. 1; 81 S. W. 18 (1904).

As to effect of statute prohibiting coercion of employee by discharge or threatening to discharge because of connection with any "lawful organization," see *Gillespie v. People*, 188 Ill. 176; 58 N. E. 1007; 52 L. R. A. 283; 80 Am. St. Rep. 176 (1900).

As to significance of "franchise" in prohibition against grant of exclusive franchise, see *Lasher v. People*, 183 Ill. 226; 55 N. E. 663; 47 L. R. A. 802; 75 Am. St. Rep. 103 (1899); *Board of Trade v. People*, 91 Ill. 80 (1878); and compare *Chicago City Ry. Co. v. People*, 73 Ill. 541, 547 (1874); *Bank of Augusta v. Earle*, 13 Peters, 519, 595; 10 L. Ed. 274 (1839); *Morgan v. Louisiana*, 93 U. S. 217, 223; 23 L. Ed. 860 (Oct. T., 1876); *City of Bridgeport v. N. Y. & New Haven R. R.*, 36 Conn. 255, 266; 4 Am. Rep. 63, 71 (1869); *People v. Utica Ins. Co.*, 15 Johns (N. Y.), 358, 387; 8 Am. Dec. 243, 257 (1818); *Slingerland v. International Con-*

tracting Co., 43 App. D. 215, 223; 60 N. Y. Suppl. 12, 17 (1899); *City of Brooklyn v. Nassau Electric R. R. Co.*, 44 App. D. 462; 60 N. Y. Suppl. 33 (1899). As to prohibition against making any irrevocable grants of special privileges or immunities, see *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 219; 22 Supm. 820, 823; 46 L. Ed. 1132 (1902); *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham Street Ry. Co.*, 79 Ala. 465; 58 Am. Rep. 615 (1885); *Dickinson v. Cunningham*, 140 Ala. 527; 37 So. 345 (1904); against grants of "special privileges or immunities, that may not be altered, revoked or repealed." *Humphreys v. State*, 70 Ohio St. 67, 84; 70 N. E. 957, 961; 65 L. R. A. 776, 782; 101 Am. St. Rep. 888 (1904); against granting "privileges or immunities which upon the same terms shall not equally belong to all citizens," etc., *Ex parte Whitley*, 144 Cal. 167; 77 Pac. 879 (1904); *Ferner v. State*, 151 Ind. 247; 51 N. E. 360 (1898); *Matter of Bank of Commerce*, 153 Ind. 460; 53 N. E. 950; 47 L. R. A. 489 (1899); *Boomershine v. Uline*, 159 Ind. 500; 65 N. E. 513 (1902); *Hoop v. Affleck*, 162 Ind. 564; 70 N. E. 978 (1904); *Brady v. Matern*, 125 Iowa, 158; 100 N. W. 358; 106 Am. St. Rep. 291 (1904); *White v. Holman*, 44 Oreg. 180; 74 Pac. 933 (1904); *Sandys v. Williams*, 46 Oreg. 327; 80 Pac. 642 (1905); *Re Watson*, 17 S. D. 486; 97 N. W. 463 (1903); *Fleetwood v. Read*, 21 Wash. 547; 58 Pac. 665; 47 L. R. A. 205 (1899); *McDaniels v. Connolly Shoe Co.*, 30 Wash. 549, 555; 71 Pac. 37, 39; 60 L. R.

municipal corporation in the absence of statutory authority,²⁸

A. 947, 949; 94 Am. St. Rep. 889 (1902). As to application of such prohibition to provision as to time of payment of wages, see *Seelyville Coal & Mining Co. v. McGlosson*, 166 Ind. 561; 77 N. E. 1044; 117 Am. St. Rep. 396 (1906); to provision as to number of hours of labor, *State v. Muller*, 48 Ore. 252; 85 Pac. 855; 120 Am. St. Rep. 805 (1906). As to effect of such provisions upon restrictions created in exercise of police power, see § 111. For instances of legislative grants of the exclusive privilege to supply gas to cities, held invalid under such provisions, see *St. Louis Gas-Light Co. v. St. Louis Gas, Fuel, etc., Co.*, 16 Mo. App. 52 (1884); *Citizens' Gas-Light Co. v. Louisville Gas Co.*, 81 Ky. 263 (1883).

In *People ex rel. Tyroler v. War-den of City Prison*, 157 N. Y. 116; 51 N. E. 1006; 43 L. R. A. 264; 68 Am. St. Rep. 763 (1898), a statute limiting to certain persons the right to buy and sell passage tickets seems to have been regarded as contravening a constitutional provision against "depriving of any of the rights and privileges secured to any citizen thereof," though the decision was mainly on the ground that it contravened the provision against depriving of "liberty." To the contrary, see *Jannin v. State*, 42 Tex. Crim. App. 631; 51 S. W. 1126; 53 L. R. A. 349; 96 Am. St. Rep. 821 (1899). As to effect of exclusive privileges sought to be obtained under general laws, see § 151. As to effect of exception as to power to grant charters of incorporation, see *City of Memphis*

v. Memphis Water Co., 5 Heisk. (Tenn.) 495, 530 (1871).

For constitutional prohibitions against "perpetuities and monopolies," see under anti-trust acts, c. XX.

²⁸ *Birmingham & Pratt Mines St. Ry. Co. v. Birmingham Street Ry. Co.*, 79 Ala. 465; 58 Am. Rep. 615 (1885); *Conover v. Long Branch Commission*, 65 N. J. Law, 167; 47 Atl. 222 (1900); *Thrift v. Elizabeth City*, 122 N. C. 31; 30 S. E. 349; 44 L. R. A. 427 (1898); *Clarksburg Electric Light Co. v. City of Clarksburg*, 47 W. Va. 739; 35 S. E. 994; 50 L. R. A. 142 (1900). See *Ludington Water Supply Co. v. City of Ludington*, 119 Mich. 480; 78 N. W. 558 (1899). For an instance of a city ordinance held void as creating a monopoly, see *City of Danville v. Noone*, 103 Ill. App. 290 (1902). So of an ordinance requiring all printing done for the city to bear a union label, *City of Atlanta v. Stein*, 111 Ga. 789; 36 S. E. 932; 51 L. R. A. 335 (1900); *Marshall & Bruce Co. v. City of Nashville*, 109 Tenn. 495; 71 S. W. 815 (1903); *Haeussler v. City of St. Louis*, 35 Am. Law Rev. 97 (St. Louis C. C., 1901). So of such requirement in specifications prescribed according to advertisement for bid, *People ex rel. Single Paper Co. v. Edgcomb*, 112 App. D. 604; 98 N. Y. Suppl. 965 (1906). See also *Holden v. City of Alton*, 179 Ill. 318; 53 N. E. 556 (1899), and decisions cited in *City of Atlanta v. Stein*, *supra*. In *National Surety Co. v. Kansas City Hydraulic Press Brick Co.*, 73 Kan. 196; 84 Pac. 1034 (1906); *Atkin v. Wyandotte*

but is frequently conferred. A grant of such power is, however, strictly construed.²⁹

Coal & Lime Co., 73 Kan. 768; 84 Pac. 1040 (1906), was denied the validity of selection by municipal authorities of a particular paving material. As to invalidity of requirement of license to engage in particular business, as "monopolistic" in its tendency, see *Gray v. City of Omaha*, 114 N. W. 600; 14 L.

R. A. N. S. 1033 (Supm. Ct. Neb., 1908). As to grants of right to supply gas, water, etc., see § 110.

²⁹ *Town of Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637; 68 S. W. 761 (1902); *Clarksburg Electric Light Co. v. City of Clarksburg*, *supra*.

CHAPTER XIV

RESTRICTION UPON COMPETITION AS RESULTING FROM ACTS OF INDIVIDUALS

- § 115. Restriction upon competition as resulting from acts of individuals.
- 116. Monopoly as resulting from acts of individuals.
- 117. Extension of doctrine of illegality of monopoly resulting from act of government, to restriction upon competition resulting from acts of individuals.
- 118. Restriction upon competition, whether necessarily illegal.
- 119. Presumption against validity of restriction upon competition.
- 120. Substantial control of supply as test of legality.
- 121. Effect of tendency to produce illegal restriction.
- 122. Prospect of competition.
- 123. Forestalling; ingrossing; regrating.
- 124. Fixing, raising or lowering price.
- 125. Agreement to fix price.
- 126. Agreement to fix wages.
- 127. Deterioration in quality.
- 128. Forcing out of, or preventing from entering employment.
- 129. Combination as element of illegality.
- 130. What may be subject of illegal restriction; e. g., tangible commodities; services.
- 131. Articles of necessity.
- 132. Business of public character.
- 133. Reasonableness as test of legality.
- 134. Agreements in restriction upon competition.
- 135. Agreement in restriction upon competition, whether necessarily illegal.
- 136. Trusts.
- 137. Pools.
- 138. Agreements for future delivery.
- 139. Corners.
- 140. Agreements for exclusive service, dealing or agency.
- 141. Grant by carrier of exclusive privilege.
- 142. Grant of exclusive privilege of soliciting patronage of passengers.
- 143. Grant of exclusive privilege to connecting carrier.
- 144. Grant by carrier of exclusive privilege of transportation.
- 145. Discrimination by carrier as between members of general public.
- 146. Grant of right to establish line of telegraphic communication along right of way of railroad.

147. Agreements not to bid.

148. Combinations among owners of patents.

§ 115. **Restriction upon competition as resulting from acts of individuals.**—As already seen, a restriction upon competition may result from an act of government. But it may also result from the acts of mere individuals,¹ and, indeed, under modern conditions of business, it is restrictions of the latter kind that are more commonly presented for public and judicial consideration. It is obvious that such restrictions may be infinitely various as to degree. If of a hundred grocers transacting business in a given community, one withdraws from business, it may be that there results a restriction upon competition, but if so it would ordinarily be hardly appreciable. If out of three grocers so transacting business one withdraw, there might be an appreciable, though incomplete, restriction. If all but one withdraw, there is, for the time being at least, a complete restriction.

§ 116. **Monopoly as resulting from acts of individuals.**—As in case of a restriction upon competition resulting from an act of government, a restriction upon competition resulting from acts of individuals is, if complete, or approximately complete, what is commonly known as a monopoly. It is obvious, however, that the definitions seen to have been applied to a monopoly resulting from an act of government are not applicable here. Hence have resulted new definitions. Thus: "A monopoly, in the modern sense, is created when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practi-

¹ Although ordinarily an illegal combination in restriction upon competition is among sellers, yet there is no inherent reason why such a combination should not exist among buyers, as was held to

be the case in *State v. Smiley*, 65 Kan. 240, 263; 69 Pac. 199, 207; 67 L. R. A. 903, 913 (1902); *Arnold v. Jones Cotton Co.*, 152 Ala. 501; 44 So. 662; 12 L. R. A. N. S. 150 (1907).

cally suppress competition.”² “A monopoly exists where all or so nearly all of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein.”³ So “any combination the tendency of which is to prevent competition in its broad and general sense, and to control, and thus at will enhance prices, to the detriment of the public, is a legal monopoly.”⁴ So

² U. S. v. American Tobacco Co., 164 Fed. 700, 721 (C. C. N. Y., 1908). See numerous decisions cited.

³ *Herriman v. Menzies*, 115 Cal. 16, 20; 46 Pac. 730, 731; 35 L. R. A. 318, 319; 56 Am. St. Rep. 82 (1896); *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945, 958 (C. C. N. Y., 1908).

⁴ *People v. North River Sugar Refining Co.*, 54 Hun, 355, 377; 3 N. Y. Suppl. 401, 413; 2 L. R. A. 33, 42 (1889). To like effect, *State v. Eastern Coal Co.*, 70 Atl. 1 (Supm. Ct. R. I., 1908); *Jones v. Carter*, 101 S. W. 514 (Tex. Civ. App. 1907; holding a reservation in a deed invalid as a monopoly within the meaning of a provision of the Texas Constitution); *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 520; 56 S. E. 264, 269; 10 L. R. A. N. S. 268, 280; 116 Am. St. Rep. 901 (1907). See also *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549, 559; 41 Pac. 495, 497; 29 L. R. A. 839, 843 (1895); *Continental Securities Co. v. Interborough Rapid Transit Co.*, *supra*; *California Steam Nav. Co. v. Wright*, 6 Cal. 258 (1856); *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed.

58, 82; 7 C. C. A. 15, 86; 24 L. R. A. 73, 82 (8th C., 1893). In the case last cited it was held that no monopoly of trade was evidenced by the contract, *each member being left to compete* with every other for its share of the traffic, and competing companies not parties to the arrangement, being in operation in the same region. But see reversal in 166 U. S. 290; 17 Supm. 540; 41 L. Ed. 1007 (1897). See also *Re Greene*, 52 Fed. 104, 115 (C. C. Ohio, 1892).

The business of collecting news and furnishing reports thereof to newspapers held under the circumstances not to constitute a monopoly. *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410; 60 S. W. 91; 51 L. R. A. 151; 81 Am. St. Rep. 368 (1900). See on the general subject, article in 3 Va. Law Reg. 163, 177 (1897-8) by W. L. Royall.

Comparatively speaking, the use of the words “monopoly,” “monopolizing,” etc., in the anti-trust acts, is not frequent or conspicuous; for instances, however, of prohibitions against “monopolizing” or “attempting to monopolize,” or “creating,” “establishing,” or “maintaining” a “monopoly,” “encouraging monopoly,” “monopolizing trade

revolutionary has been the recent extension of the meaning attached to the word "monopoly" that there is even a tendency to wholly exclude what was originally covered by the term.⁵

§ 117. **Extension of doctrine of illegality of monopoly resulting from act of government, to restriction upon competition resulting from acts of individuals.**—Though for centuries monopolies have been condemned by the common law of England, such condemnation was, until comparatively recently, limited in its scope to monopolies created by the crown.⁶ But such condemnation has now been extended,⁷ not only to monopolies,

or commerce," or the like, see under the Federal act (c. XIX); also under Ga. (§ 207); Miss. (§ 219); Mont. (§ 221); N. M. (§ 223); N. Y. (§ 224); Utah (§ 233); Wis. (§ 235). For somewhat elaborate definitions of a monopoly, see under S. C. (§ 229); of "trust or monopoly," under S. D. (§ 230). For constitutional provisions especially directed against monopolies, see under Ark. (§ 205); Md. (§ 216); N. C. (§ 225); S. D. (§ 230); Tenn. (§ 231); Tex. (§ 232); Wash. (§ 234); Wyom. (§ 236).

⁵ With reference to the use of the term "monopolize" in the Federal and Louisiana anti-trust acts, it was said in *American Biscuit & Manuf. Co. v. Klotz*, 44 Fed. 721 (C. C. La., 1891): "In construing the Federal and State statutes *we exclude* from consideration all monopolies which exist by legislative grant; for we think the word 'monopolize' cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the lawmaker has used the word to mean 'to aggregate' or 'concentrate' in the hands of few, practically, and as a matter of fact, and according to the known results of

human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word 'pooling.'"

⁶ See § 109.

⁷ How recently is indicated by so comparatively recent a decision as *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, 147; 56 Am. Dec. 164, 177 (1851), where an agreement was sustained as not tending to create a monopoly, the court saying: "The cases cited all arose upon royal grants or by-laws, and consequently were cases of involuntary restraints. They do establish the doctrine that the grant of a monopoly is void; but they do not support the averment of the plaintiff in error. . . . I assert that the right to stifle competition by contract, so far as it is injurious to the parties contracting, has not before been denied or questioned for two hundred years, unless two cases reported in 4 Denio, 349; 47 Am. Dec. 258, and 5 Denio, 434; 49 Am. Dec. 282, are to be considered as denying the right." (Referring to *Hooker v. Vandewater* and *Stanton v. Allen*, respectively.) It was asserted by Francis Wharton in 3 Crim. Law Mag. 1, 5 (1882), that, "in this country, the right of individuals to buy up

but to other restrictions upon competition resulting from acts of individuals. Thus it is said: "The idea of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is, 'the notion of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action."⁸ "The objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same, whether created by patent, or by an extensive combination among those engaged in similar industries, controlled by one management."⁹ The propriety of this extension of the condemnation is generally recognized, in this country at least, but has in some quarters been denied, though it is not always clear whether the denial is based on the impropriety of allowing *any* such extension, or on the impropriety of allowing it in the particular

staples, provided no fraud or coercion be practiced, was not, at least between 1820 and 1875, questioned." Compare *Queen Ins. Co. v. State*, 86 Tex. 250, 269; 24 S. W. 397, 403; 22 L. R. A. 483, 493 (1893). In Stickney's "State Control of Trade and Commerce," which contains an elaborate criticism of the prevalent doctrine in condemnation of restrictions upon competition, the point that its true basis is the doctrine against monopolies was not considered. See, however, pp. 94, 95.

See articles in 33 Am. Law Rev. 499 (1899) by Lionel Norman; 13 Harv. Law Rep. 198, 265, 273 (1899-1900) by E. Q. Keasbey; also in 20 Pol. Sci. Quart. 13 (1905), on "The Law Concerning Monopolistic Combinations in Continental Europe" by Francis Walker.

⁸ National Cotton Oil Co. v.

Texas, 197 U. S. 115; 25 Supm. 379; 49 L. Ed. 689 (1905). See also *People v. North River Sugar Refining Co.*, 54 Hun, 355, 377; 3 N. Y. Suppl. 401, 413; 2 L. R. A. 33, 42 (1889); *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22; 50 S. E. 876; 112 Am. St. Rep. 936 (1905); *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389 (C. C. N. Y., 1907); *U. S. v. American Tobacco Co.*, 164 Fed. 700, 720 (C. C. N. Y., 1908).

⁹ *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137, 187; 30 N. E. 279, 290; 15 L. R. A. 145, 159; 34 Am. St. Rep. 541, 554 (1892). Here it was also said: "Monopolies have always been regarded as contrary to the spirit and policy of the common law," the only authority cited on this point being *Darcy v. Allein*, a case, as we have seen, of a monopoly created by act of government.

case.¹⁰ Restrictions upon competition resulting from acts of individuals seem to have, as a rule, escaped condemnation in England.¹¹

¹⁰ Thus, in *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, 150; 56 Am. Dec. 164, 179 (1851), recovery was allowed on a lease of a warehouse, though, to the knowledge of the plaintiff, executed in furtherance of an agreement between proprietors of six wheat mills on the one hand, and the proprietors of twelve warehouses on the other, whereby the warehousemen were to give the former "*full, absolute and uninterrupted control of the Milwaukee wheat market*, so far as they shall be able to do so, by virtue of their capacity as warehousemen or vessel and dock owners." But, as said in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 285; 29 C. C. A. 141, 154; 46 L. R. A. 122, 133 (6th C., 1898), this decision cannot be upheld in view of the more modern authorities.

¹¹ See articles in 13 Harv. Law Rev. 198, 265, 275 (1899-1900) by E. Q. Keasbey; 28 Law Mag. & Rev. 303 (1902-3) by D. F. Pen-
nant.

In *Smith v. Scott*, 4 Paton (Scotland), 17 (1798), a combination among those engaged in the business of chaise hirers or post-masters in Edinburgh, to raise the price of service, was declared illegal by the House of Lords, on appeal from Scotland. The court said: "The case is very different whether an individual might or might not ask what rate for posting he thought fit; but he must not make a party business of it." But this decision seems to have been generally overlooked; and in England, restrictions

that would now, at least, be held illegal in most of our States, have been sustained, as appears from the following instances: In *Hearn v. Griffin*, 2 Chitty, 407 (1815), an agreement between two rival coach proprietors not to run in opposition to each other, and to charge the same prices, was sustained by the King's Bench against the objection that it was void as "in restraint of that competition in trade which is so conducive to the interest of the public." It was said by Lord Ellenborough: "This is merely a convenient mode of arranging two concerns which might otherwise ruin each other." In *Wickens v. Evans*, 3 Younge & J. 318 (1829), an agreement among three persons, rivals in the business of selling trunks and boxes in different parts of England, entered into in view of the inconvenience and loss resulting from rivalry, and whereby each should have the right to do business in certain districts to the exclusion of the others, was held not illegal as "in restraint of trade." It was clearly shown in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 284; 29 C. C. A. 141, 153; 46 L. R. A. 122, 132 (6th C., 1898), that this decision is opposed to later ones, in this country at least. In *Shrewsbury & Birmingham Ry. Co. v. London & Northwestern Ry. Co.*, 16 Jurist, 311 (1851), an agreement between two railway companies tending to prevent competition, was held not unlawful, the operation of the agreement being, however, limited to one particular line of

§ 118. **Restriction upon competition, whether necessarily illegal.**—A monopoly created by the crown seems to have been necessarily illegal,¹² and, subject to the limitations hereafter considered,¹³ the same seems true of what is strictly a monopoly, that is, a complete restriction upon competition, resulting from the acts of individuals. But, however it may have been as to restrictions upon competition created by the crown, it seems clear enough that not all restrictions upon competition resulting from the acts of individuals are illegal.¹⁴ This results from the view that

road. So in *Hare v. London & Northwestern Ry. Co.*, 2 Johnson & Hemming, 80, 103 (Eng. Ch., 1861), an agreement among competing railroad companies for a division of profits in certain fixed proportions, was held not illegal, as preventing competition, in the absence of statutory provisions. The court said: "It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." So far as such restrictions are held illegal in England, it would seem to be according to the test of *reasonableness*. See *Collins v. Locke*, § 133, *infra*. On the other hand, as was pointed out in *U. S. v. Addyston Pipe & Steel Co.*, *supra* (85 Fed. 286; 29 C. C. A. 155; 46 L. R. A. 133), the decision in *Mogul S. S. Co. v. McGregor*, App. Cas. (1892), 25, is not in point on this branch of our subject.

¹² This statement may, however, be subject to the same limitation as that referred to in note 13, *infra*.

¹³ Thus, as to the character of the article monopolized, see § 131.

¹⁴ In *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 64; 42 N. E. 403 (1895), it was said: "Not all

combinations are condemned and self-preservation may justify prevention of undue and ruinous competition, when the prevention is sought by fair and legal methods." To similar effect, *Rafferty v. Buffalo City Gas Co.*, 37 App. D. 618; 56 N. Y. Suppl. 288 (1899). See dissenting opinion of Holmes, J., in *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Supm. 436; 48 L. Ed. 679 (1904). It was said in *Oakdale Manuf. Co. v. Garst*, 18 R. I. 484; 28 Atl. 973; 23 L. R. A. 639; 49 Am. St. Rep. 784 (1894): "It does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not in-

seems to be generally accepted, that the economic effects of a restriction upon competition are not necessarily evil, in other words, that unrestricted competition results in economic evils, capable of prevention or removal by some degree at least of restriction upon such competition.¹⁵ A different view of such

injurious to the public." See *State v. Eastern Coal Co.*, 70 Atl. 1 (Supm. Ct. R. I., 1908). See as to regulation of cemetery association, *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605; 44 S. E. 769 (1903). In *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430; 38 N. E. 461; 26 L. R. A. 544 (1894), it was held not illegal for a person whose business is threatened with competition, to persuade his competitor to abandon his business and take employment with the other, at a stated compensation.

¹⁵ In *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 450; 41 S. E. 553, 562; 57 L. R. A. 547, 558; 90 Am. St. Rep. 126 (1902), it was said: "It seems that in some cases in New York and elsewhere, an idea has arisen of determining how much competition is desirable, and apparently of holding that extreme competition is undesirable, and a combination to meet it is not unlawful."

The unsatisfactory character of such a standard was pointed out by Taft, J., in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 284; 29 C. C. A. 141, 153; 46 L. R. A. 122, 132 (6th C., 1898), and see note to *Harding v. American Glucose Co.* (74 Am. St. Rep. 244).

Although other grounds were relied on, the court, in *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, 150; 56 Am. Dec. 164, 180 (1851), thus vigorously attacked the maxim that "competition is the life of trade":

"If it be true that competition is the life of trade, it may follow such premises that he who relaxes competition commits an act injurious to trade; and not only so, but he commits an act of overt treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, that maxim is one of the least reliable of the host that may be picked up in every market place. It is in fact the shibboleth of mere gambling speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century competition in trade has caused more individual distress, if not more public injury, than the want of competition. Indeed, by reducing prices below or raising them above values (as the nature of the case prompted), competition has done more to monopolize trade, or to secure exclusive advantages in it, than has been done by contract." Similar views as to the evils of competition had been expressed in *Palmer v. Stebbins*, 3 Pick. (Mass.), 188; 15 Am. Dec. 204 (1825); *Chappel v. Brockway*, 21 Wend. (N. Y.) 157, 165 (1839). In *Pierce v. Fuller*, 8 Mass. 223; 5 Am. Dec. 102 (1811), an agreement between proprietors of two rival stages between Boston and Providence, that one should not run a stage between those points, was sustained. The court

economic effects has, however, led to judicial declaration in sweeping condemnation of any restriction upon competition,¹⁶

said: "The public appear to have no interest in this question." In a note by Francis Wharton in 11 Fed. 11, it is suggested that this decision, and that in *Perkins v. Lyman*, 9 Mass. 522 (1813), may be explained on the ground that the acts complained of were breaches of trust. In *Whitney v. Slayton*, 40 Me. 224 (1855), the tendency in this country to excessive competition in business, was regarded as ground for liberally construing exceptions to the common-law rule against contracts in restraint of trade. In *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629 (1887), a combination among manufacturers and sellers of curtain fixtures known as "wood balance shade rollers," to sell at a uniform price for their common benefit, dividing the profits, was sustained, they being the principal dealers and substantially supplying the market, though others were engaged in the business "in a small way." The court said: "The general purpose of the combination was to prevent, or rather to regulate, competition between the parties to it in the sale of the particular commodity which they made. This is a lawful purpose. . . . Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts, and to put a price on the products of their own industry." In *Skrainka v. Scharinghausen*, 8 Mo. App. 522 (1880), an agreement among twenty-four proprietors of stone-quarries in a

portion of St. Louis, providing for the sale of all the rubble building-stone of such quarries by a common agent for a period of six months, at prices fixed by the agreement, was sustained. By its terms the agreement was designed to prevent the depression of prices *resulting from competition*, making it impossible to work quarries at a profit. We shall show elsewhere (§ 161) that here the court improperly applied the test of *space limit*.

In *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505, 576, 577; 19 Supm. 25, 34; 43 L. Ed. 259 (1898), were discussed the effects of competition upon the business of railroads—whether favorable or otherwise to the commerce in which they are engaged. The agreement under consideration was held to directly and effectually stifle competition and thus be within the prohibition of the Federal anti-trust act against contracts "in restraint of trade or commerce," "notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed, and the survivor thereafter raises rates and maintains them."

¹⁶ A very little consideration will show the untenability of, for instance, the following oft-quoted statement in *Hooker v. Vandewater*, 4 Denio (N. Y.), 349; 47 Am. Dec. 258 (1847): "Competition is the life of trade. It follows that whatever destroys or even *relaxes competition* in trade is injurious, if not fatal, to it." See also *State ex rel. v. Portland Natural Gas & Oil Co.*,

though, as may readily be inferred, there is no decision to that effect.

§ 119. **Presumption against validity of restriction upon competition.**—In some instances has been declared the existence of a presumption against the validity of a restriction upon competition.¹⁷ On the other hand, the existence of such a presumption has been denied,¹⁸ and it seems at least doubtful whether, if it exist, it is of substantial service.

§ 120. **Substantial control of supply as test of legality.**—If now a complete restriction upon competition be illegal, and if also there be nothing necessarily illegal in a mere restriction upon competition, where is the line of distinction between a legal and an illegal restriction? On the one hand, a restriction resulting in the control of 100 per cent. of the supply of a given commodity within a given area is illegal. On the other hand, a restriction resulting in the control of, say, only five or ten per cent. of such supply within such area is doubtless not illegal, at

153 Ind. 483; 53 N. E. 1089; 53 L. R. A. 413; 74 Am. St. Rep. 314 (1899).

The prohibitions contained in the anti-trust acts (cc. XIX, XX) commonly expressly include incomplete, as well as complete, restrictions upon competition, as witness the use of the words "destroy," "prevent," "lessen," "hinder," "restrain," "limit," "restrict," "obstruct," "delay," "defeat," "preclude," or the like, as applied to combinations in restriction upon competition, or, as it is sometimes expressed, "*full and free*," or "*free, fair and full*," or "unrestricted," or "free and unrestricted" competition.

¹⁷ Hoffman v. Brooks, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cin., 1884). So in Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 185; 8 Am. Rep. 159, 164 (1871), such presumption was applied, but under the mistaken supposition,

elsewhere considered (§ 160), that the doctrine against restrictions upon competition, is, based on that against contracts in restraint of trade. In Cleveland, Columbus, Cincinnati, etc., Ry. Co. v. Closser, 126 Ind. 348, 360, 363; 26 N. E. 159, 163, 164; 9 L. R. A. 754, 760, 761; 22 Am. St. Rep. 593, 603, 605 (1890); Chicago, Indianapolis, etc., Ry. Co. v. Southern Indiana Ry. Co., 38 Ind. App. 234, 239; 70 N. E. 843, 845 (1904), the presumption was applied to combinations among competing carriers.

¹⁸ U. S. v. Trans-Missouri Freight Assoc., 58 Fed. 58, 78; 7 C. C. A. 15, 82; 24 L. R. A. 73, 87 (8th C., 1893); and see Leslie v. Lorillard, 110 N. Y. 519, 533; 18 N. E. 363, 366; 1 L. R. A. 456, 461 (1888); Herriman v. Menzies, 115 Cal. 16, 21; 46 Pac. 730, 731; 35 L. R. A. 318, 319; 56 Am. St. Rep. 82 (1896).

least, not necessarily.¹⁹ But where shall the line be drawn? Clearly not at 100 per cent., that is to say, it is unnecessary that the restriction be complete, in order that it be illegal.²⁰ But shall it be drawn at 60 or 70 or 80 or 90 per cent.? The an-

¹⁹ In *Booth v. Davis*, 127 Fed. 875, 879 (C. C. Mich., 1904), where a contract was enforced against the objection that "the complainant was a trust and a monopoly," it appeared that its business was "but a small fraction of that done by other dealers in the same commodities in the territory covered by its operations, and that it was but one of several hundred dealers in that territory." See, however, § 121.

²⁰ See *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 237; 20 Supm. 96, 106; 44 L. Ed. 136 (1899); *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 109; 29 Supm. 220, 226 (1909); *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252, 264 (C. C. Cal., 1898); *Montague v. Lowry*, 115 Fed. 27; 52 C. C. A. 621; 63 L. R. A. 58 (9th C., 1902); *U. S. v. MacAndrews, etc., Co.*, 149 Fed. 823 (C. C. N. Y., 1906); *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869 (C. C. Mich., 1907); *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774, 781 (C. C. Ky., 1908); *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19, 26 (Supm. Ct. Fla., 1908); *Dunbar v. American Telephone, etc., Co.*, 224 Ill. 9; 79 N. E. 423; 115 Am. St. Rep. 132 (1906); *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 112 (1904); *Sanford v. People*, 121 Ill. App. 619 (1905); *Chapin v. Brown*, 83 Iowa, 156; 48 N. W. 1074; 12 L. R. A. 428; 32 Am. St. Rep. 297 (1891); *State v. Smiley*, 65 Kan. 240, 262; 69 Pac. 199, 206; 67 L. R. A. 903,

912 (1902); *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906); *Hunt v. Riverside Co-operative Club*, 140 Mich. 538; 104 N. W. 40; 112 Am. St. Rep. 420 (1905); *State ex inf. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 44; 52 S. W. 595, 607; 45 L. R. A. 363, 376 (1899); *State ex inf. Crow v. Armour Packing Co.*, 173 Mo. 356, 391; 73 S. W. 645, 653; 61 L. R. A. 464, 474; 96 Am. St. Rep. 515 (1903); *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 69; 71 S. W. 691, 692 (1902); *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co.*, 90 Miss. 551; 43 So. 435; 8 L. R. A. N. S. 1053 (1907); *People v. North River Sugar Refining Co.*, 54 Hun. 355, 377; 3 N. Y. Suppl. 401, 413; 2 L. R. A. 33, 42 (1889); *De Witt Wire-Cloth Co. v. N. J. Wire-Cloth Co.*, 16 Daly, 529; 14 N. Y. Suppl. 277; affirmed, it seems, in 38 N. Y. State Reporter, 1023 (1891); *Bailey v. Master Plumbers*, 103 Tenn. 99, 114; 52 S. W. 853, 856; 46 L. R. A. 561, 565 (1899); *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 525; 56 S. E. 264, 271; 10 L. R. A. N. S. 268, 282; 116 Am. St. Rep. 901 (1907). See also *American Handle Co. v. Standard Handle Co.*, 59 S. W. 709, 718 (Tenn. Ch. App., 1900).

Thus in *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 19 S. W. 274; 15 L. R. A. 598; 29 Am. St. Rep. 690 (1892), a combination of manufacturers of the products of

swer is perhaps not entirely satisfactory, namely, that such restriction is illegal if resulting (or tending to result) in the *substantial control of the supply* of a given commodity (or of services of a given kind) ²¹ within a given area, or, to refer to a definition already given, if the result is that "all or *so nearly all* of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, as to *practically* bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein." ²² This test of legality we

cotton and cotton seed, embracing within its operation the chief cities or commercial centers of the State, as well as the cotton-producing regions thereof, was held illegal, though it did not appear that they were the only parties who were engaged at the specified localities in such manufacture. So in *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880), the restriction was held illegal, though "competition was not in fact destroyed."

²¹ Thus, for instance, services performed in furnishing means of transportation by railroad or otherwise.

²² See § 116. In *People v. North River Sugar Refining Co.*, 54 Hun, 355, 370; 3 N. Y. Suppl. 401, 409; 2 L. R. A. 33, 40 (1899), where the restriction condemned was very extensive, the court said: "All the cases, ancient and modern, agree that a combination, the tendency of which is to prevent *general* competition and to control prices, is detrimental to the public, and consequently unlawful." But in *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 484; 49 N. E. 563, 564 (1898), an allegation that a corporation "had acquired a great many oil mills and plants, and was managing a *large business*," was held

insufficient to show that it was a "trust." It was said by S. C. T. Dodd, 7 Harv. Law Rev. 157, 159 (1893), that "the word 'monopoly,' not only as popularly used, but as ordinarily used in legal decisions, means only a *large business*." See also Eddy on Combinations, § 31. Compare dissenting opinion of Holmes, J., in *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Supm. 436; 48 L. Ed. 679 (1904). See 2 Eddy on Combinations, § 725, for alleged distinction between "contracts to suppress competition" and "contracts to control the market."

In the anti-trust acts (see c. XX), there has been comparatively little tendency to regard the existence of a substantial control of the supply as the test of legality of a restriction upon competition. In an Indiana act, however (see § 210), the prohibition includes combinations "between persons or corporations who *control the output*," and the persons designed to be affected by the act are those "who own, *control* or manufacture the *output* of any particular article of merchandise mentioned herein." See also, in the different acts, prohibitions against combinations to "fix," "limit," "control," "regulate," "increase,"

may call *the test of extent*. There seems to be an unavoidable vagueness incident to the conception of a restriction upon competition illegal according to this test.²³ Roughly speaking, it is illegal, if resulting in the control of, say, 90 or, at any rate, 95 per cent. of the supply within a given area.²⁴ The difficulty of

"reduce," "restrict," "diminish," "lessen," "influence" or "prevent," "amount," "quantity," "production," "output," "transportation," "manufacture," "sale," "use," "consumption" or "exchange."

What is said in Noyes on Inter-corporate Relations, 2d Ed., c. 35, as to "control of the market," seems in general harmony with the view herein stated.

²³ Such vagueness is not infrequently revealed in the decisions. See, for instance, *Rafferty v. Buffalo City Gas Co.*, 37 App. D. 618; 56 N. Y. Suppl. 288 (1899), where, though there was held to be no illegal restriction upon competition, the court evidently had in mind no clearly defined test of the validity of such restrictions. There is nothing in the facts as reported, to indicate whether the restriction would have resulted or tended to result in the substantial control of the supply in the territory affected, though it was stated that a "monopoly" was not created. So far as any test was applied at all, it seems to have been that of reasonableness. See § 133. It was stated that the object was to prevent *ruinous* or *destructive* competition. But the facts indicating such competition to be destructive were not clearly stated.

²⁴ The following seem to be properly classed as cases where, in determining the legality of restrictions, the test of extent was applied; that is to say, the restriction was held to be illegal, or not il-

legal, according to whether there resulted a substantial control of the supply of a given commodity (or of services of a given kind) within a given area. For convenience of reference the decisions are arranged according to States, following the Federal decisions. Generally speaking, there are not here included decisions under the various "anti-trust acts." See cc. XIX, XX. With reference to the English decisions, as has been already intimated, so far as they hold such restrictions illegal, it seems to be according to the test of reasonableness rather than that of extent. *Hilton v. Eckersley*, 6 El. & Bl. 47 (1885), has sometimes been referred to as an authority for condemning such restrictions, but the element of tendency of the combination there under consideration to restrict competition, did not enter into the case, which was decided on entirely different grounds. See article in 3 Va. Law Reg. 163, 178 (1897-8) by W. L. Royall. For facts in *Hilton v. Eckersley*, see § 53.

The following restrictions held illegal, save as otherwise specially indicated:

FEDERAL: Agreements among three corporations owning or controlling all the railroads in Colorado and northern New Mexico, providing for division of the country, allotting to each party a portion for the purpose of building new roads, also that neither would "voluntarily connect with or take busi-

applying the test is increased by the circumstance that the area

ness from or give business to any railroad" to be thereafter constructed in the territory of the other. *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 15 Fed. 650, 655 (C. C. Colo., 1883). Scheme whereby twenty-two different persons, firms or corporations manufacturing and selling at least ninety per cent. of the "float spring tooth harrows" made in the country, assigned to a corporation formed for the purpose, all United States letters patent then respectively owned or thereafter to be acquired by them relating to such harrows, the corporation to issue to each member of the combination exclusive licenses to manufacture and sell, at uniform prices and upon the same terms, on its own account, the style of harrow that he had been making, each licensee being forbidden to manufacture or sell other than his own specific form of harrow. *National Harrow Co. v. Hench*, 76 Fed. 667 (C. C. Pa., 1896); affirmed in 83 Fed. 36; 27 C. C. A. 349; 3 L. R. A. 299 (3d C., 1897; action by corporation against licensees for enforcement of contracts). The same result had been reached in like suits by the same corporation, in *National Harrow Co. v. Quick*, 67 Fed. 130 (C. C. Ind., 1895); *National Harrow Co. v. Bement*, 21 App. D. 290; 47 N. Y. Suppl. 462 (1897). See, as to N. Y. act, § 224. Attempt of corporation to secure control of another, as part of general plan "to secure control of practically the entire output of lake copper." *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869 (C. C. Mich., 1907).

National Harrow Co. v. Bement

was reversed in 163 N. Y. 505; 59 N. E. 764 (1900), which was affirmed as *Bement v. National Harrow Co.*, 186 U. S. 70; 22 Supm. 747; 46 L. Ed. 1058 (1902). But the decisions in 163 N. Y. and 186 U. S. seem to have no bearing on the question of the validity of the restriction held illegal in 21 App. D. For they were based on the technical ground of the absence from the record of material evidence relied on in the decision in 21 App. D. The same result (as in *National Harrow Co. v. Hench*, supra) had also been reached in an action against the same corporation to be relieved from the agreement. *Strait v. National Harrow Co.*, 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891). As to effect of patents being involved, see § 148. Agreement among those controlling 80 per cent. of the total product, to form a combination to restrict the production of wooden dishes throughout the country and keep up the price, held illegal. *Cravens v. Carter-Crume Co.*, 92 Fed. 479; 34 C. C. A. 479 (6th C., 1899).

See under § 125 *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. 553 (C. C. N. Y., 1886); under § 192, *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 288; 29 C. C. A. 141, 157; 46 L. R. A. 122, 134 (6th C., 1898).

ALABAMA: Agreement that had the effect of suppressing competition between the only two parties engaged in supplying ice within a region of 7,000 inhabitants held illegal. *Tuscaloosa Ice Manuf. Co. v. Williams*, 127 Ala. 110; 28 So. 669; 50 L. R. A. 175; 85 Am. St. Rep. 125 (1900).

within which a restriction may be illegal need not necessarily

CALIFORNIA: In *People ex rel. v. American Sugar Refining Co.*, 7 Ry. & Corp. L. J. 83 (Super. Ct. San Francisco, 1890), was condemned the combination also condemned in *People v. North River Sugar Refining Co.* (see under NEW YORK). See, under § 125, *Herriman v. Menzies*, 115 Cal. 16; 46 Pac. 730; 35 L. R. A. 318; 56 Am. St. Rep. 82 (1896).

CONNECTICUT: In *State v. Hartford & New Haven R. R. Co.*, 29 Conn. 538 (1861), the decision was based upon the failure of a railroad corporation to perform a corporate duty, though the circumstance that such failure resulted in the creation of a monopoly, was touched upon.

GEORGIA: In *Central R. R. Co. v. Collins*, 40 Ga. 582, 631 (1869), the question really was as to the power of a railroad corporation to acquire stock in another, for the purpose of controlling its management. But some stress was laid on the circumstance that the sole object of the arrangement was to prevent the ruinous competition that the corporation, whose stock was sought to be acquired, had entered into, and was contrary to public policy. Compare *Hazlehurst v. Savannah, etc., R. R. Co.*, 43 Ga. 13, 57 (1871). In *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 434; 41 S. E. 553, 555; 57 L. R. A. 547, 550; 90 Am. St. Rep. 126 (1902), an association composed of only about three-fourths of the druggists in Atlanta was regarded as illegal.

ILLINOIS: The following restrictions held illegal: Agreement among the proprietors of four grain houses, controlling the business in a cer-

tain town, for fixing prices and a division of profits. *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171 (1875). Agreement by a corporation having the power to supply gas in any part of Chicago, not to supply another corporation within a certain portion. This might have rested on the ground that the corporation could not abandon a public duty; but it was also said: "The contract between these corporations tends to create and perpetuate a monopoly in the furnishing of gas to the city, and is, therefore, against public policy." *Chicago Gas-light & Coke Co. v. People's Gas-light & Coke Co.*, 121 Ill. 530, 544; 13 N. E. 169, 174; 2 Am. St. Rep. 124, 133 (1887). Holding by a company formed to manufacture and sell gas, of a majority of the stock of the only other four gas companies in Chicago, it having a capital stock of \$25,000,000, they of nearly \$17,000,000. The decision might, however, have rested on the ground of the absence of express statutory authority to so hold stock. *People ex rel. Chicago Gas Trust Co.*, 130 Ill. 268, 292; 22 N. E. 798, 802; 8 L. R. A. 497, 505; 17 Am. St. Rep. 319, 331 (1898). "Trust" agreement, for description of which see § 136. There is, however, nothing in the agreement, or indeed in the report of the case, to show that those engaged in this combination constituted a controlling interest in the preserving business. So far as appears, they may have constituted but an insignificant portion. Probably the court was unconsciously influenced by the common rumor concerning the nature of the combination.

comprise the entire world, or even the entire civilized world, or

Bishop v. American Preservers' Co., 157 Ill. 284, 311; 41 N. E. 765, 774; 48 Am. St. Rep. 317 (1895). See under § 125, *More v. Bennett*, 140 Ill. 69; 29 N. E. 888; 15 L. R. A. 361; 33 Am. St. Rep. 216 (1892); *Cummings v. Foss*, 40 Ill. App. 523 (1891); *Foss v. Cummings*, 149 Ill. 353; 36 N. E. 553 (1894). *Huston v. Reutlinger* (see under KENTUCKY) was followed in a similar case, *People ex rel. v. Chicago Live Stock Exchange*, 170 Ill. 556; 48 N. E. 1062; 39 L. R. A. 373; 62 Am. St. Rep. 404 (1897), holding illegal a by-law of an exchange of live-stock commission merchants, creating restrictions as to the number, kind and compensation of solicitors to be employed by members. Combination, the object of which was "to give to its members a monopoly in the retail coal business in their respective localities, thus enabling them to regulate prices independent of legitimate and healthful competition" held illegal. *Sanford v. People*, 121 Ill. App. 619 (1905); so held in view of statute imposing criminal liability for conspiracy "to do any illegal act injurious to the public trade."

INDIANA: Agreement between two gas companies engaged in business in the city of Portland, whereby the price of gas to be charged consumers was fixed, and neither company was to supply any patron of the other, there being no other company or person in the city engaged in the business of supplying gas, held illegal. *State ex rel. v. Portland Natural Gas & Oil Co.*, 153 Ind. 483; 53 N. E. 1089; 53 L. R. A. 413; 74 Am. St. Rep. 314 (1899).

IOWA: Agreement among the groccrymen in a certain town, not to engage in the butter business, so as to enable one firm to have a monopoly of that business, held illegal. *Chapin v. Brown*, 83 Iowa, 156; 48 N. W. 1074; 12 L. R. A. 428; 32 Am. St. Rep. 297 (1891).

KENTUCKY: Agreement between proprietors of steamboats, rivals in the freight and passenger trade on the Kentucky river, for a division of net profits, in order to prevent the rivalry between them, held illegal, though there was no agreement as to charges. It would seem, though not distinctly stated, that this arrangement resulted in a complete monopoly. *Anderson v. Jett*, 89 Ky. 375; 12 S. W. 670; 6 L. R. A. 390 (1889). See under § 125, *Sayre v. Louisville Union Benev. Assoc.*, 1 Duvall, 143; 85 Am. Dec. 613 (1863). In *Huston v. Reutlinger*, 91 Ky. 333; 15 S. W. 867; 34 Am. St. Rep. 225 (1891), an injunction was granted against the enforcement by an association of underwriters, of by-laws imposing restrictions upon its members as to the number of solicitors they might employ, the time of employment, compensation to be paid, and forbidding them to contract with a solicitor, so as to make his pay depend on the number of risks he procured, and forbidding an employment of a solicitor who had severed his connection with another member. It seems a sufficient ground for the decision that the by-laws were unauthorized by the fundamental law of the association, but the court unnecessarily, as it seems to us, adduce the further ground that they created unlawful restric-

even a single country or State. Indeed, instances are numerous

tions upon competition. It does not appear to what extent the association controlled the business in question. In *Ætna Ins. Co. v. Commonwealth*, 106 Ky. 864; 51 S. W. 624; 45 L. R. A. 355 (1899), a combination similar to that under consideration in *Huston v. Reutlinger* was assumed to be illegal, though the decision was on the ground that there was no criminal liability therefor.

LOUISIANA: Agreement among eight firms in New Orleans, holding 7,410 bales of India cotton bagging, not during three months to sell any of it without the consent of the majority held illegal. Nothing appears, however, to show how large a portion of the supply these bales constituted. *India Bagging Assoc. v. Kock*, 14 La. Ann. 168 (1859). Agreement among competing railroad corporations to divide their earnings from competition held illegal. *Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co.*, 41 La. Ann. 970, 980; 6 So. 888, 891; 17 Am. St. Rep. 445, 453 (1889).

MASSACHUSETTS: In *Taylor v. Blanchard*, 13 Allen, 370; 90 Am. Dec. 203 (1866), an agreement not to manufacture and sell shoe cutters in Massachusetts was held non-enforceable at the suit of a person who was one of four in the State to whom the business was confined. See, however, under § 125, *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629 (1887).

MICHIGAN: See under § 125, *Richardson v. Buhl*, 77 Mich. 632, 657; 43 N. W. 1102, 1110; 6 L. R. A. 457, 465 (1889); *Lovejoy v. Michels*, 88 Mich. 15; 49 N. W. 901; 13 L. R. A. 770 (1891).

MISSOURI: See *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880; for facts in which, see § 118).

NEBRASKA: "Trust" agreement (the "Distillers' & Cattle Feeders' Trust") not only to limit the production of alcohol, but to dismantle as many distilleries as the trust might see fit, held illegal. *State v. Nebraska Distilling Co.*, 29 Neb. 700; 46 N. W. 155 (1890).

NEW HAMPSHIRE: See *Currier v. Concord R. R. Co.*, 48 N. H. 321 (1869); *Morrill v. Boston & Maine R. R.*, 55 N. H. 531 (1875), as to statute against railroad monopolies.

NEW JERSEY: Agreements that, if enforced, would have secured the control of the production of three-fourths of the sanitary ware produced in the United States held illegal. *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 730; 39 Atl. 923, 945 (1898); reversed, however, in 58 N. J. Eq. 507; 43 Atl. 723; 46 L. R. A. 255; 78 Am. St. Rep. 612 (1899). In *Elkins v. Camden & Atlantic R. R. Co.*, 36 N. J. Eq. 5, 14 (1882), the purchase by a railroad corporation of the stock and bonds of a rival road, was held to be "clearly *ultra vires* as a purchase with a view to extinguishing competition." In *Meredith v. N. J. Zinc & Iron Co.*, 55 N. J. Eq. 211; 37 Atl. 539 (1897); affirmed in 56 N. J. Eq. 454; 41 Atl. 1116 (1897), the legality of the consolidation of the business of rival corporations, owners of property containing zinc ores, was sustained, it appearing that the amount produced by the consolidated corporation constituted but a small fraction of the world's supply.

where a single community, such as a city or town, has been re-

So in *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340; 48 Atl. 912 (1901), of acts done with a view to a consolidation of corporations engaged in producing coffee and sugar, it not appearing to what extent they controlled the supply, the court saying: "Neither of the companies mentioned here has any monopoly of either sugar or coffee. The world's product of each is immense. Any person can go into the market and buy either of them in unlimited quantities."

NEW YORK: Agreement among owners of several lines of competing canal boats, to fix the rates of freight and divide their net earnings held illegal. *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258 (1847; under statute, now Penal Code, § 168, subd. 6, forbidding conspiracy "to commit any act injurious to trade or commerce"). Followed in *Stanton v. Allen*, 5 Denio, 434; 49 Am. Dec. 282 (1848), a case very similar as to facts. These two decisions were sought to be distinguished in *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, 152; 56 Am. Dec. 164, 181 (1851), as based on conditions peculiar to canal transportation in the State of New York. This distinction avails little, in view of the extensive application that has been given to the doctrine of those cases. The following restrictions held illegal: Agreement not to extend construction of railroad, the object being to prevent competition with another road. *Hartford & New Haven R. R. Co. v. N. Y. & New Haven R. R. Co.*, 3 Robt. 411 (1865), which was distinguished in *Ives v. Smith*, 3 N. Y. Suppl. 645, 654; affirmed in 8 Id.

46 (Supm. Ct., Gen. T., 1889), where an agreement having reference to the future construction of railroads was sustained. Scheme to control the shipment and supply of coal for the Elmira market. *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190 (1877). As to means by which this was to be effected, see § 172. "Trust" agreement among seventeen corporations in different parts of the United States, engaged in the manufacture, refining and sale of sugar, leaving not more than six other companies or firms not engaged in the business. *People v. North River Sugar Refining Co.*, 54 Hun, 354; 7 N. Y. Suppl. 406; 5 L. R. A. 386 (1889; under Penal Code, § 168, subd. 6; see *Hooker v. Vandewater*, supra); affirmed on another ground in 121 N. Y. 582; 24 N. E. 834; 9 L. R. A. 33; 18 Am. St. Rep. 843 (1890). See as to trust agreements generally, § 136. Agreement among brokers and dealers in sheep and lambs consigned to market in New York City and vicinity, to take effect at the same time with an agreement among butchers transacting business in the same locality; the brokers to sell only to the butchers, and the butchers to buy only from the brokers. *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. 790 (1893). Combination comprising all the retail coal dealers in the city of Lockport, except one. *People v. Sheldon*, 139 N. Y. 251; 34 N. E. 785; 23 L. R. A. 221; 36 Am. St. Rep. 690 (1893; sustaining conviction for conspiracy under Penal Code, § 168, subd. 6; see *Hooker v. Vandewater*, supra). For an elaborate criticism of *Peo-*

garded as an area sufficiently large for a restriction upon compe-

ple *v. Sheldon*, see *Stickney's "State Control of Trade and Commerce."*

Combination among fifteen persons who were "the producers of nearly the whole product of Hudson River blue stone, and of at least 90 per cent. of the whole amount of such stone sold in the New York market to customers in various States east of the Mississippi River," their yearly sales amounting to upwards of \$1,500,000. *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401; 58 N. E. 525; 52 L. R. A. 262; 79 Am. St. Rep. 655 (1900). See also under anti-trust act of 1899, as to restriction relating to books, *Straus v. American Publishers' Assoc.*, 177 N. Y. 473; 69 N. E. 1107; 64 L. R. A. 701; 101 Am. St. Rep. 819 (1904). As to monopoly in the business of railroad transportation in New York City, see § 224.

In *Export Lumber Co. v. South Brooklyn Sawmill & Lumber Co.*, 54 App. D. 518; 67 N. Y. Suppl. 626 (1900), a secret agreement among dealers in lumber as to the method of transacting their export business, including the division of profits and losses in certain agreed proportions was held not illegal, it not appearing "that any of the parties were producers of lumber or that they in any manner controlled the supply of lumber in that market for export or other purposes." See *Francis v. Taylor*, 31 Misc. 187; 65 N. Y. Suppl. 28 (Supm. Ct., Sp. T., 1900). See, as to illegality of combination for control of business of manufacturing and selling carbons for electric lighting, *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46; 23 N. E. 530; 7 L. R. A. 46 (1890). See *Strait v. National*

Harrow Co., under Federal decisions.

See, under § 125, *Leonard v. Poole*, 114 N. Y. 371; 21 N. E. 707; 4 L. R. A. 728; 11 Am. St. Rep. 667 (1889); *People v. Milk Exchange*, 145 N. Y. 267; 39 N. E. 1062; 27 L. R. A. 437; 45 Am. St. Rep. 609 (1895); *Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292; 59 N. E. 906 (1901); *Drake v. Siebold*, 81 Hun, 178; 30 N. Y. Suppl. 697 (1894); *De Witt Wire-Cloth Co. v. N. J. Wire-Cloth Co.*, 16 Daly, 529; 14 N. Y. Suppl. 277 (1891).

NORTH CAROLINA: Agreement not to compete in the sale of certain articles (flour, meats, oil and lard) within certain territory, "including several counties" held illegal. Nothing, however, appears from the report to indicate the extent to which the parties to the agreement controlled the trade in such articles within such territory. *Culp v. Love*, 127 N. C. 457; 37 S. E. 476 (1900).

OHIO: The following restrictions held illegal: Agreement among all the salt manufacturers (with one or two exceptions) in a large salt-producing territory, and whose aggregate annual product was about 140,000 barrels, for the purpose of regulating the price and grade. *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880). Association of manufacturers of ninety-five per cent. of all the star candles in that part of the United States east of the western boundary of Utah. *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 24 N. E. 660; 21 Am. St. Rep. 819 (1890). Agreement to establish a virtual monopoly of the

tition to become illegal, though confined in its operation within

business of producing petroleum and of manufacturing, refining and dealing in it and all its products, throughout the entire country. Here, where the facts were similar to those in *People v. North River Sugar Refining Co.* (see *supra*), the court might, as in that case, have refrained from passing on the question of monopoly, and based its decision on the ground that the agreement subjected the corporation to an outside control inconsistent with its character as a corporation. *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137; 30 N. E. 279; 15 L. R. A. 145; 34 Am. St. Rep. 541 (1892). Association of all or nearly all the brick manufacturers and dealers in and about a certain place, formed to control the price. *Jackson v. Akron Brick Assoc.*, 53 Ohio St. 303; 41 N. E. 257; 35 L. R. A. 254; 53 Am. St. Rep. 637 (1895). See under § 125, *Hoffman v. Brooks*, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cin., 1884). In *Crawford v. Wick*, 18 Ohio St. 190; 98 Am. Dec. 103 (1868), in an opinion strikingly picturesque as to language, was condemned an agreement by an employer to exercise his influence over his employees to induce them to deal solely with a third person, one of the grounds assigned being that it tended to "unwarrantable monopoly." Compare *Dionne v. New Iberia Refining, etc., Assoc.*, 50 La. Ann. 690; 23 So. 624 (1898).

PENNSYLVANIA: The following restrictions held illegal: Agreement among corporations controlling coal fields that constituted the great source of supply of bituminous coal to the State of New York and large

territories westward, the purpose and effect being thus described: "These corporations represented almost the entire body of bituminous coal in the northern part of the State. By combination between themselves they had the power to control the entire market in that district. And they did control it by a contract not to ship and sell coal otherwise than as therein provided. And, in order to destroy competition, they provided for an arrangement with dealers and shippers of anthracite coal. They were thereby prohibited from selling under prices to be fixed by a committee representing each company. And they were obliged to suspend shipments upon notice from an agent that their allotted share of the market had been forwarded or sold." The court said: "The combination is wide in scope, general in its influence." *Morris Run Coal Co. v. Barclay*, 68 Pa. St. 173, 183, 184; 8 Am. Rep. 159, 162, 163 (1871; under New York statute, now Penal Code, § 168, subd. 6; see *Hooker v. Vandewater*, *supra*). Combination among forty-five brewers of Philadelphia, individuals, firms and corporations, to regulate and control the sale and price of beer within the city of Philadelphia and the county of Camden, New Jersey. *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; 29 Atl. 102; 24 L. R. A. 247; 41 Am. St. Rep. 894 (1894).

In *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288; 59 Atl. 1088; 105 Am. St. Rep. 812 (1904), however, the soundness of the decision in *Morris Run Coal Co. v. Barclay*, was doubted, though the completeness of

the limits of such area.²⁵ Although what we have here called

the combination there under consideration may have been overlooked. The court concluded in *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, that in the case at bar there appeared no *intention* to obtain exclusive possession of the commodity in question, but see on this point, § 172. It is difficult to avoid the conclusion that that decision indicates a tendency to greatly relax the application of the doctrine against restrictions upon competition as manifested in the earlier Pennsylvania decisions.

RHODE ISLAND: In *Oakdale Manuf. Co. v. Garst*, 18 R. I. 484; 28 Atl. 973; 23 L. R. A. 639; 49 Am. St. Rep. 784 (1894), was sustained an agreement among three of the four companies in New England engaged in the manufacture of oleomargarine, to consolidate into one corporation.

TENNESSEE: By-law of association composed of most of the plumbers in the city of Memphis, such by-law requiring each member to pay the association a fixed sum for any work done by him "in competition with any other member" held illegal. It appeared that the amount of such payment was commonly added to the price of the work on account of which the payment was made. In the decision reference was made to other provisions in the by-laws similar to those under consideration in the decisions discussed in § 34. These by-laws were declared illegal, both at common law and under the anti-trust act. The decision might, however, have rested on the ground that the by-laws

were unauthorized by the charter. *Bailey v. Master Plumbers*, 103 Tenn. 99; 52 S. W. 853; 46 L. R. A. 561 (1899). Compare *Milwaukee Masons & Builders' Assoc. v. Niezerowski*, under **WISCONSIN**, *infra*.

TEXAS: Agreement among independent dealers in and purchasers of cotton seed, engaged separately in the business of manufacturing therefrom "oil, oil cake, and other products of cotton and cotton seed," in various cities in the State, such agreement not only fixing prices, but prohibiting one of the parties in particular from purchasing, handling or shipping, directly or indirectly, any cotton seed at many of the most important markets in the State, and binding it to deliver the entire product, "make or yield" from cotton seed of its mills, to the other party to the contract, in consideration of certain profits guaranteed to it, held illegal. *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 19 S. W. 274; 15 L. R. A. 598; 29 Am. St. Rep. 690 (1892). In *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1; 44 S. W. 936 (1898), so far as appears, the transactions held unlawful were merely agreements for exclusive dealing and selling at a fixed price, which certainly are not, considered by themselves, unlawful.

WEST VIRGINIA: In *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22; 50 S. E. 876; 112 Am. St. Rep. 936 (1905), was held unenforceable an agreement between two corporations engaged in the production and sale of natural gas,

²⁵ See note 24. *supra*.

the test of extent seems to be that in effect generally accepted, it also seems reasonably obvious that a rigidly consistent application of it, not merely throughout a country or State generally, but throughout its communities, large and small, would be practically impossible, or, if possible, in a high degree disastrous. In short, the test is inadequate, being incapable of consistent and logical application.

§ 121. **Effect of tendency to produce illegal restriction.**—It has already been stated that while a restriction resulting in the control of 100 per cent. of the supply of a given commodity within a given area is illegal, yet such a restriction resulting in the control of, say, only five or ten per cent. is doubtless not illegal, at least not necessarily.²⁶ But this statement must be

by which each had the exclusive right to furnish gas in certain areas, and fixing prices dependent for charge upon mutual consent.

WISCONSIN: By-laws of association composed of about sixty of the seventy or seventy-five mason contractors in Milwaukee, the object being to suppress fair and free competition for building contracts in Milwaukee, it being provided that each member should submit any bid for a contract to the association, and that the lowest bidder should add six per cent. to the amount of his bid, before submitting it to the owner or architect, held illegal. So the right to bid on changes or additions was limited to the original contractor, unless the amount was larger than the contract price. *Milwaukee Masons & Builders' Assoc. v. Niezerowski*, 95 Wis. 129; 70 N. W. 166; 37 L. R. A. 127; 60 Am. St. Rep. 97 (1897). Compare *Bailey v. Master Plumbers*, under TENNESSEE, *supra*. *Milwaukee Masons & Builders' Assoc. v. Nie-*

zerowski, was followed as applicable to combination to monopolize the livery business in Milwaukee. *Gatzow v. Buening*, 106 Wis. 1, 12; 81 N. W. 1003, 1006; 49 L. R. A. 475, 480; 80 Am. St. Rep. 17 (1900). Contrary to the later decisions in Wisconsin and elsewhere is *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, 145; 56 Am. Dec. 164, 176 (1851), sustaining an agreement to give the "full, absolute and uninterrupted control of the Milwaukee wheat market," so far as the contracting parties should be "able to do so, by virtue of their capacity as warehousemen or vessel and dock-owners," it appearing, however, that the rest of Wisconsin was an open and uninterrupted market for the sale of wheat. See, under § 125, *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; 56 N. W. 864; 39 Am. St. Rep. 902 (1893).

See generally, article in 20 Harv. Law Rev. 167 (1907) by Herbert Pope.

²⁶ See § 120.

taken with an important qualification. Though the restriction may be not illegal, if considered apart from the tendency presently to be considered, yet it may well be illegal in the light of such tendency. Thus the circumstances attending its existence may be such as to indicate a speedy increase to a control of 90 or 95 per cent. That under these conditions the restriction would be regarded as illegal seems to accord with the generally accepted doctrine that a restriction will be pronounced illegal at any stage, though at the time harmless, if it appear that in the natural course of events it will develop into a restriction harmful, considered by itself; in other words, if its tendency is to become actually harmful.²⁷ This seems, however, to be a rather loose

²⁷ *Northern Securities Co. v. U. S.*, 193 U. S. 197, 332; 24 Supm. 436, 454; 48 L. Ed. 679 (1904); *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, 623; 53 C. C. A. 256, 269 (6th C., 1902); *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 192 (C. C. N. Y., 1905); *Arnold v. Jones Cotton Co.*, 152 Ala. 501; 44 So. 662; 12 L. R. A. N. S. 150 (1907); *Flower v. Smith Lumber Co.*, 47 So. 1022 (Supm. Ct. Ala., 1908); *State ex rel. v. Portland Natural Gas & Oil Co.*, 153 Ind. 483; 53 N. E. 1089; 53 L. R. A. 413; 74 Am. St. Rep. 314 (1899). See *Clark v. Needham*, 125 Mich. 84; 83 N. W. 1027; 51 L. R. A. 785; 84 Am. St. Rep. 559 (1900).

In *Harding v. American Glucose Co.*, 182 Ill. 551, 615; 55 N. E. 577, 598; 64 L. R. A. 738, 763; 74 Am. St. Rep. 189 (1899), it was stated as the test whether the "necessary consequence" "is the controlling of prices, or limiting of production, or suppressing of competition, in such a way as thereby to create a monopoly." The doctrine stated in the text seems to be the true ground of the decision in

More v. Bennett, 140 Ill. 69, 80; 29 N. E. 888, 891; 15 L. R. A. 361, 364; 33 Am. St. Rep. 216, 220 (1892), where an association of stenographers in Chicago was held illegal as having for its object the prevention of competition, notwithstanding that but a small portion of the law stenographers in the city belonged to the association. The court said: "True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection." See also *Chicago, Wilmington, etc., Coal Co. v. People*, 214 Ill. 421, 452; 73 N. E. 770, 780 (1905). So in *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642; 47 S. E. 247; 65 L. R. A. 342; 104 Am. St. Rep. 1013 (1904), of an agreement among coal companies operating in the same vein by which they appointed a common agent to sell at uniform prices. They were referred to in the opinion as being only "three small companies out of the vast

and elastic doctrine, perhaps dangerously so.²⁸ The possibilities of its application are numerous and the determination of the question of legality in any particular instance must depend largely on the circumstances of the case. In applying this doc-

number of coal producing companies in the State," and the quantity of coal put upon the market by them was said to be "an utterly insignificant portion of the vast quantities thrown upon the market by the numerous competing producers." *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 531; 56 S. E. 264, 273; 10 L. R. A. N. S. 268, 285; 116 Am. St. Rep. 901 (1907), seems to go very far in applying this doctrine. Here was held established the existence of an illegal combination among corporations, producers of coke, against the objection thus stated, it being regarded as a sufficient answer that "it is not essential that the monopoly be complete before it is illegal": "It does not appear what part or per cent. of the total production of the P. coal field is produced by the 20 corporations. It is said that together they may produce only one per cent. of the total production of the field."

In *Stockton v. Central R. R. Co.* of N. J., 50 N. J. Eq. 52, 81; 24 Atl. 964, 975; 17 L. R. A. 97, 109 (1892), where a lease between railroad companies was held unlaw-

ful as part of a scheme to secure a monopoly of the Pennsylvania anthracite coal traffic, it was said: "It is true, co-operation of the remaining coal roads, which is necessary to a complete monopoly, has not yet been secured. By this lease only one competitor is silenced, and only a little more than one-half of the entire coal region is controlled. It is only the second step in the direction of monopoly, the first being the lease of the L. V. railroad. It is to be remembered, however, that the attorney-general may have his injunction when the *ultra vires* act tends, or is of a nature, to produce public injury. He is not required to wait until all the monopoly possible is created, or until all the injury possible is in process of infliction." See, however, *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 43 Atl. 723; 46 L. R. A. 255; 78 Am. St. Rep. 612 (1899); reversing 56 N. J. Eq. 680; 39 Atl. 923 (1898).

In *Anheuser-Busch Brewing Assoc. v. Houck*, 27 S. W. 692 (Tex. Civ. App., 1894); affirmed as *Houck v. Anheuser-Busch Brewing Assoc.*, 88 Tex. 184; 30 S. W. 869

²⁸ See drastic criticism in 1 Eddy on Combinations, § 553. A decided tendency to reaction against such doctrine may be apparent in *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288; 59 Atl. 1088; 105 Am. St. Rep. 812 (1904), where, considering the extent of the operations involved, it

is difficult to see how, consistently with the weight of authority, the court reached the conclusion that there was no intention to obtain exclusive possession of the commodity in question. Moreover, as will be seen *infra*, even if there was an absence of such intention, that circumstance was not conclusive.

trine, great weight will be given to the presumption, derived from common observation, of the tendency of an individual to promote his own interests, even at the expense of the public interest.²⁹ The doctrine may apply even although at a given

(1895), a combination to control the supply of beer was held illegal, notwithstanding testimony that its only object and effect were to reduce expenses. So, in *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268, 291; 22 N. E. 798, 802; 8 L. R. A. 497, 504; 17 Am. St. Rep. 319, 331 (1889), where holding of stock by one corporation in others, was held illegal as enabling it to control them and establish a monopoly, the court said: "The question is not whether it has attempted to exercise such control; the law looks to the general tendency of the power conferred."

The doctrine stated in the test is frequently sought to be declared by statute; as witness, in the anti-trust acts (see c. XX), the use, with reference to restrictions upon competition, of such expressions as "with a view," "intended," "tend," "with the intent," "designed," "intended to have the effect," "having for its object," "attempt," "reasonably calculated to produce."

In *Swift v. U. S.*, 196 U. S. 375, 396; 25 Supm. 276, 279; 49 L. Ed. (1905), in holding a scheme as a whole unlawful under the Federal

anti-trust act, against the objection that the several acts charged were lawful and that intent could make no difference, it was said: "Intent is almost essential to such a combination (i. e., in restraint of commerce), and is essential to such an attempt (i. e., to monopolize commerce). Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law, in some cases, directs itself against that dangerous probability as well as against the completed result." To like effect, *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 109; 29 Supm. 220, 226 (1909), which see (also § 232), as to constitutional objections to prohibitions against acts "reasonably calculated" or "tending" to produce restrictions upon competition.

²⁹ Thus, it was said in *Stockton v. Central R. R. Co. of N. J.*, 50 N. J. Eq. 52, 84; 24 Atl. 964, 976; 17 L. R. A. 97, 110 (1892): "It is possible that such a monopoly may be used as the defendants suggest, to introduce economies and cheapen coal, but it does violence to our knowledge of human nature

to expect such a result." So in *People v. North River Sugar Refining Co.*, 54 Hun. 354, 379; 7 N. Y. Suppl. 406, 411; 5 L. R. A. 386, 389 (1889). "Where the effect of the arrangement is to permanently secure the control, or the substantial control, of this product and of its sale, as that has been done, it

stage the restriction is actually beneficial, for the inquiry will not be limited to that stage, but the restriction will be pronounced illegal, if its remote and permanent, as distinguished from its immediate and temporary, effects, promise to be harmful.³⁰ Thus, while the raising of prices may not be an immediate and temporary effect, it may be a remote and permanent effect.³¹ Nor will so uncertain an element as the intent of the

is no more than just to infer that the control is to be used to avoid competition and enhance prices, and in that manner, as it is the ordinary expedient for that end, promote the interests and add to the profits of the associates." See also *State ex rel. v. Standard Oil Co.*, *infra.* But a different view was taken in *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629 (1887), sustaining a combination among the principal dealers in a commodity, who substantially supplied the market. The court said: "We cannot assume that the purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price and to prevent the injurious effects, both to producers and customers, of fluctuating prices, caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid, as in restraint of trade or against public policy."

³⁰ Thus notably in *State ex rel. v. Standard Oil Co.*, 49 Ohio St.

137, 186; 30 N. E. 279, 290; 15 L. R. A. 145, 159; 34 Am. St. Rep. 541, 553 (1892), the "Standard Oil Trust" was condemned, even conceding that it had improved the quality, and cheapened the cost of petroleum and its products to the consumer. This decision was approvingly cited on this point in *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 736; 39 Atl. 923, 944 (1898). See also *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 125; 54 S. W. 289, 293 (1899). In *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252, 264 (C. C. Cal., 1898), a combination to fix the price of coal was held illegal, against the contention that it was beneficial in protecting consumers from the dishonest methods of some dealers, and protecting wholesale dealers in enabling them to collect their bills from retail dealers. See also note 31, *infra.*

³¹ Thus, restrictions were condemned, notwithstanding that they had resulted in lowering prices, in *Richardson v. Buhl*, 77 Mich. 632, 660; 43 N. W. 1102, 1111; 6 L. R. A. 457, 466 (1889); *Hunt v. Riverside Co-operative Club*, 140 Mich. 538; 104 N. W. 40; 112 Am. St. Rep. 420 (1905); *Strait v. National Harrow Co.*, 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891). See *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 106

parties to the restriction be considered, the test being rather whether, under the circumstances, the opportunity exists for them to create, as a remote and permanent effect, a harmful restriction.³²

(1904). *Richardson v. Buhl* was approvingly cited on this point in *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 736; 39 Atl. 923, 944 (1898). Compare *U. S. v. Swift*, 122 Fed. 529, 534 (C. C. Ill., 1903). So, in the absence of proof that unreasonable prices resulted. *Anderson v. Jett*, 89 Ky. 375; 12 S. W. 670; 6 L. R. A. 390 (1889); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880); *Hoffman v. Brooks*, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cin., 1884); *People v. Sheldon*, 139 N. Y. 251; 34 N. E. 785; 23 L. R. A. 221; 36 Am. St. Rep. 690 (1893); *Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292, 304; 59 N. E. 906, 910 (1901). See also *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 238; 20 Supm. 96, 106; 44 L. Ed. 136 (1899); *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 45; 82 C. C. A. 158, 179; 12 L. R. A. N. S. 135, 150 (6th C., 1907); *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 435, 436; 41 S. E. 553, 555, 556; 57 L. R. A. 547, 551; 90 Am. St. Rep. 126 (1902); *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 68; 71 S. W. 691, 692 (1902). So, in *People v. Milk Exchange*, 145 N. Y. 267, 274; 39 N. E. 1062, 1064; 27 L. R. A. 437, 441; 45 Am. St. Rep. 609 (1895), where a combination to control the price and supply of milk was held illegal, it was said: "It may be claimed that the purpose of the combination was to reduce the price of milk, and that, it being an article

of food, such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination, was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and at their option to enhance the price to be paid by the consumers." See also *Gibbs v. McNeeley*, 118 Fed. 120, 123; 55 C. C. A. 70, 73; 60 L. R. A. 152, 155 (9th C., 1902); *Harding v. American Glucose Co.*, 182 Ill. 551, 620; 55 N. E. 577, 600; 64 L. R. A. 738, 765; 74 Am. St. Rep. 189 (1899); *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 106 (1904).

As to prohibition in Texas act against combination for "increasing or reducing" prices, see *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118; 54 S. W. 289 (1899).

³² Thus, in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 184; 8 Am. Rep. 159, 162 (1871), the agreement was held void, notwithstanding the claim that "its true object was to lessen expenses, to advance the quality of the coal, and to deliver it in the markets it was to supply, in the best order, to the consumer." So, in *Hooker v. Vandewater*, 4 Denio (N. Y.), 349; 47 Am. Dec. 258 (1847), of an agreement professedly "for the purpose of establishing and maintaining fair and uniform rates of freight and equalizing the business among

§ 122. **Prospect of competition.**—There are few, if any, cases in which, however complete may be a restriction upon competition, the prospect of competition is entirely absent. All existing coal mines, for instance, may be under a single con-

themselves, and to avoid all unnecessary expense." So, where it was conceded that one of the purposes was "to enable the parties to obtain reasonable prices." *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401; 58 N. E. 525; 52 L. R. A. 262; 79 Am. St. Rep. 655 (1900). So, in *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; 17 Supm. 540; 41 L. Ed. 1007 (1897), of an agreement professedly "for the purpose of mutual protection by establishing and maintain'g reasonable rates, rules and regulations on all freight traffic, both through and local." See also *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, 623; 53 C. C. A. 256, 269 (6th C., 1902); *U. S. v. American Tobacco Co.*, 164 Fed. 700, 721 (C. C. N. Y., 1908); *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19, 26 (Supm. Ct. Fla., 1908); *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 100 (1904); *State ex inf. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 42; 52 S. W. 595, 607; 45 L. R. A. 363, 375 (1899); *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 69; 71 S. W. 691, 692 (1902); *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. 790 (1893); *Kellogg v. Sowerby*, 190 N. Y. 370; 83 N. E. 47 (1907); *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; 29 Atl. 102; 24 L. R. A. 247; 41 Am. St. Rep. 894 (1894); *State v. Virginia-Carolina Chemical Co.*, 71 S. C. 544, 562; 51 S. E. 455, 462 (1905); *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 125;

54 S. W. 289, 293 (1899); *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22; 50 S. E. 876; 112 Am. St. Rep. 936 (1905); *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 529; 56 S. E. 264, 273; 10 L. R. A. N. S. 268, 284; 116 Am. St. Rep. 901 (1907). *A fortiori*, in case of a mere absence of expression of intention to create a restriction upon competition. *People v. North River Sugar Refining Co.*, 54 Hun, 354, 374, 376; 7 N. Y. Suppl. 406, 410; 5 L. R. A. 386, 389 (1889); *Bailey v. Master Plumbers*, 103 Tenn. 99; 52 S. W. 853; 46 L. R. A. 561 (1899). See also *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 243; 20 Supm. 96, 108; 44 L. Ed. 136 (1899). But in *MacGinniss v. Boston, etc., Consolidated Copper, etc., Mining Co.*, 29 Mont. 428; 75 Pac. 89, 96 (1904), where constitutional and statutory provisions against a trust, etc., for the purpose of fixing price, etc., were held not to apply in the absence of "a criminal intent to evade or transgress" such provisions, reference was made to the doctrine of some courts that "the mere possession of power by a combination of corporations or associations, or persons, to injuriously repress competition, to regulate production, and fix prices, is against public policy," and it was said that an examination of such cases "will reveal the fact that in each particular case before the court for consideration, it appeared either from the fact proved or admitted

trol, but there remains the prospect of the discovery of other and competing mines. It would seem that insufficient effect has, as a rule, been allowed to such prospect of competition.³³ A distinction might, perhaps, well be taken between, for instance, perishable articles, and articles of permanent value, so between

or from the terms of the contract itself, that the defendants entertained and were pursuing the unlawful purpose." And see *Swift v. U. S.*, note 27, *supra*.

³³ In *Tuscaloosa Ice Manuf. Co. v. Williams*, 127 Ala. 110; 28 So. 669; 50 L. R. A. 175; 85 Am. St. Rep. 125 (1900), an agreement that had the effect of suppressing competition between the only two parties engaged in supplying ice within a region of 7,000 inhabitants, was condemned, notwithstanding the possibility of competition by other parties, and the circumstance that such competition did actually soon arise. In *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 284; 29 C. C. A. 141, 153; 46 L. R. A. 122, 132 (6th C., 1898), it was intimated that the illegality of even a local monopoly is not removed by the circumstance that by reason of outside competition it is purely temporary. The court said: "The public interest may suffer severely while new competition is slowly developing." See comments therein on *Wickens v. Evans*, 3 *Younge & J.* 318 (1829). In *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19, 26 (Supm. Ct. Fla., 1908), where the restriction was in the business of conducting a general store in a village (see § 173), it was said: "The inhabitants of a village have a right to protection from injurious restraint of trade and monopoly in useful commodities in the village without reference to the opportunities af-

forded for obtaining the commodities in a neighboring town."

In *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945, 956 (C. C. N. Y., 1908), where was held to exist a monopoly in the business of railroad transportation in New York city (see § 224), though it did not appear that the members of the combination had obtained exclusive franchises for the construction and operation of railroads in the territory affected, or that such franchises were not obtainable or might not be obtained in the future, it was said: "Within the strict definition of 'monopoly,' if it be that a monopoly must include all present existing means of carrying on a business or doing a particular thing generally, or in a particular place or locality, and the right to possess, or own, or control all means for doing that thing in that place in the future, no monopoly has been created."

But some effect seems to have been allowed to the prospect of competition in *Francis v. Taylor*, 31 Misc. 187; 65 N. Y. Suppl. 28 (Supm. Ct., Sp. T., 1900), where, in answer to the objection that a combination between two corporations (the Wagner and Pullman "palace car companies") would create a great monopoly, the court said: "The plan in question in no way involves any restraint upon others from freely engaging in the same kind of business." In *Kellogg v. Larkin*, 3 *Pinney* (Wis.), 123,

articles that are, and those that are not, susceptible of indefinite production, as witness the distinction between certain rare natural products and ordinary manufactured articles.³⁴ Moreover, it would seem that some consideration might well be given to the vast improvements in facilities for transportation that tend to practically annihilate distance between localities.³⁵

§ 123. **Forestalling; ingrossing; regrating.**—Although, as already seen, the modern condemnation of restrictions upon competition resulting from acts of individuals is merely by way of extension of the condemnation originally limited to monopolies

147; 56 Am. Dec. 164, 177 (1851), where an agreement to secure to certain parties the "control of the Milwaukee wheat market" was held not illegal as tending to "reduce the price of wheat below its actual market value," the court said: "Wheat, being an article of almost universal consumption, has a market everywhere and a value in every market. And that value in any particular place is determined less by the number of purchasers in that place, than by its distance from and means of communication with the great central markets of the country and of the world."

³⁴ In *People v. North River Sugar Refining Co.*, 54 Hun, 355, 377; 3 N. Y. Suppl. 401, 413; 2 L. R. A. 33, 42 (1889), it was said that the definition of monopoly is "applicable to every monopoly, whether the supply be restricted by nature or susceptible of indefinite production. The difficulty of effecting the unlawful purpose may be greater in one case than in the other, but it is never impossible." But in *Booth v. Seibold*, 37 Misc. 101; 74 N. Y. Suppl. 776 (Supm. Ct., Sp. T., 1902), no illegal restriction was held to result from a contract relating to fish, "a commodity which

is practically limitless, and to be had for the catching, not only in the sea, but in all of our freshwater lakes and rivers." See remarks of Lacombe, J., in *Dueber Watch-case Manuf. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 644; 14 C. C. A. 14, 21 (2d C., 1895), as to a combination among makers of watch-cases, distinguishing *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558; 23 Am. Rep. 190 (1877), as a case where the region of the production of the commodity in question (anthracite coal) was known to be limited.

³⁵ In *Tuscaloosa Ice Manuf. Co. v. Williams*, note 33, *supra*, where the contention that ice could be brought from other places was overruled, the court said: "The position is exceedingly nude and bald, when taken in respect of a commodity like ice or water, the chief cost of which, apart from the plant for its manufacture or collection, is in the transportation to the consumer; and it may be safely said that an ice factory in a town beyond the ordinary reach of delivery wagons from another town has a monopoly of the ice business in that town."

created by the crown, the methods employed by those engaged in restriction upon competition more nearly resemble those employed by those formerly engaged in what was known as *forestalling*, *ingrossing* and *regrating*. "Forestalling, ingrossing and regrating was the offense of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up, so as to be able to command what price he chose when he got to the market. The ingrosser or regrator—for the two words had much the same meaning—was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime."³⁶ If now the illegality of these practices clearly rested on common law grounds, there would be much plausibility in the view that the modern condemnation of restrictions upon competition resulting from acts of individuals is merely by way of extension of the condemnation of such practices.³⁷ As it is, it seems, to say the least, by no means clear that the illegality thereof did not rest on statutory grounds.³⁸ The question whether they did or not

³⁶ 3 Stephen's History of the Criminal Law of England, c. 30, p. 199. See also 3 Coke's Institutes, c. 89. These offenses are said, in 2 Wharton's Criminal Law (10th Ed.), § 1849, to have been taken from the Roman law. It will be noted that these offenses could be committed by a single individual. In *Pettamberdass v. Thackoorseydass*, 7 Moore P. C. C. 239, 262 (1850), it was said that "ingrossing can be committed only with respect to the necessities of life"; and see article in 7 Harv. Law Rev. 338, 344 (1894) by W. F. Dana. As to prohibition thereof by municipal ordinance, see *Dutton v. Mayor*, etc., of Knoxville, 113 S. W. 381 (Supm. Ct. Tenn., 1908).

³⁷ For an expression of such view, see, for instance, *Queen Ins. Co. v.*

State, 86 Tex. 250, 269; 24 S. W. 397, 403; 22 L. R. A. 483, 493 (1893). See also *State v. Eastern Coal Co.*, 70 Atl. 1 (Supm. Ct. R. I., 1908). In *Oliver v. Gilmore*, 52 Fed. 562, 565 (C. C. Mass., 1892), a case of an agreement to close manufacturing works, it was said that "the contract would seem to be in violation of the old rules of the common law (i. e., against forestalling and ingrossing), intended to prevent the gathering up of the control of commodities into few hands." But *query* in the absence of evidence tending to show monopoly?

³⁸ See as to such statutes, *Queen Ins. v. State*, *supra*. See, on the general question whether such acts were illegal at common law, articles in 3 Pol. Sci. Quart. 592, 609 (1888) by T. W. Dwight; 29 Law Mag. & Rev.

seems an academic one of little practical importance, in view of the extension already considered of the rule of condemnation of monopolies created by the crown.

§ 124. **Fixing, raising or lowering price.**—The condemnation of monopolies created by the crown was professedly based on the existence of what were said to be “three *inseparable* incidents” to every such monopoly, the most conspicuous being that the price of the monopolized commodity would be raised.³⁹ But, however it might have been as to monopolies resulting from the act of government, it certainly is not an *inseparable* incident of a monopoly resulting from the acts of individuals, that the price is so raised. Assuming, however, that it is such an incident, it clearly does not follow that the circumstance of the raising of price in any way necessarily involves the existence of an illegal restriction upon competition, thus, where an individual possessing but a small portion of the supply of a given commodity, raises the price of such portion. It is obvious then that not only is the raising of price not a necessary incident of an

148 (1903-4) by P. H. Brown; *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906); *Commonwealth v. International Harvester Co.*, 115 S. W. 703, 712 (Ct. App. Ky., 1909).

Combinations, contracts, etc., “to *ingross or forestall* a commodity” are expressly included in the prohibition of the Mississippi act (§ 219).

³⁹ *Darcy v. Allein*, 11 Coke, 84b, 86b. For, as here said, “he who has the sole selling of any commodity may and will make the price as he pleases; and this word *Monopolium*, dicitur απο του μονου και πωλειω quod est, cum unus solus aliquod genus mercaturæ universum emit, pretium ad suum libitum statuens.” See also *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880); *U. S. v. Trans-Missouri Freight*

Assoc., 166 U. S. 290; 17 Supm. 540; 41 L. Ed. 1007 (1897). The doctrine seems equally capable of application to a *reduction* of prices injurious to producers. See, for instance, *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 19 S. W. 274; 15 L. R. A. 598; 29 Am. St. Rep. 690 (1892); *Ellis v. Inman*, 131 Fed. 182; 65 C. C. A. 488 (9th C., 1904). As to prohibition of Cal. Const. against raising of rates for transportation by railroad, after lowering for purpose of competition, see *Edson v. Southern Pacific R. R. Co.*, 144 Cal. 182; 77 Pac. 894 (1904).

As to duty of one enjoying monopoly (e. g., of privilege of furnishing gas) to charge reasonable rates, see *Public Service Corp. v. American Lighting Co.*, 67 N. J. Eq. 122; 57 Atl. 482 (1904).

illegal restriction upon competition, but it furnishes no adequate test of the legality of such a restriction. *A fortiori* is this the case as to merely *fixing* the price.⁴⁰

§ 125. **Agreement to fix price.**—It will hereafter be seen that the presence or absence of the element of *agreement* or *combination* furnishes no test of the legality of a restriction upon competition. It having just been seen that the fixing of price furnishes no test of such legality, it seems to follow that the presence or absence of an *agreement to fix price* furnishes no such test. This may be made clear by illustration. If within a given area there be a thousand dealers in a given commodity, an agreement between two of the smaller dealers to raise the price would produce no appreciable and hence no illegal restriction upon competition, at least not necessarily. That is to say, the agreement must be among dealers in substantial control of

⁴⁰ In *State v. Eastern Coal Co.*, 70 Atl. 1, 5, 6 (Supm. Ct. R. I., 1908), was held not sustainable an indictment for a combination to fix the price of coal, it being said: "In order to regulate and fix the price of an article it is absolutely necessary to have or to acquire the power to do so. . . . The charge is that the defendants combined to do something that can only be done through a monopoly. The act of fixing the price is only an attribute of a monopoly, an indicium by which it may be classified. It is a symptom, but it is not the disease itself."

See *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 459, 460; 60 C. C. A. 290, 295, 296; 64 L. R. A. 689, 696, 697 (8th C., 1903); *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 111 (1904). In *Elliman v. Carrington*, 2 Ch. (1901) 275, was sustained an agreement by which a wholesaler

purchasing from a manufacturer agreed not to sell below specified prices, and in case of sale to another, to procure a similar agreement from the latter. See also *Taddy v. Sterious*, 1 Ch. (1904) 354; *McGruther v. Pitcher*, 2 Ch. (1904) 306; *Garst v. Charles*, 187 Mass. 144; 72 N. E. 839 (1905). The prohibition of the anti-trust acts commonly includes combinations to increase (or reduce) price (or cost); so of combinations to "fix," "regulate," "control," "limit," "influence," "establish," "change," "maintain," or the like. Ordinarily the prohibition is absolute, but for special forms of qualification, see under the various acts, c. XX. As to effect of such statutory prohibitions, see *Clancey v. Onondaga Salt Manuf. Co.*, 62 Barb. (N. Y.) 395 (1862); *Beechley v. Mulville*, 102 Iowa, 602; 70 N. W. 107; 63 Am. St. Rep. 479 (1897).

the supply,⁴¹ to produce such result.⁴² But in this case the illegality is determined by the circumstance of their having such control, and not by the circumstance of the agreement; in other words, as just stated, the presence or absence of the agreement furnishes no test of legality.⁴³ In this view an agreement to fix

⁴¹ As to what constitutes such control, see § 120.

⁴² This is the view taken in *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; 56 N. W. 864; 39 Am. St. Rep. 902 (1893); *Herriman v. Menzies*, 115 Cal. 16; 46 Pac. 730; 35 L. R. A. 318; 56 Am. St. Rep. 82 (1896). In *Herriman v. Menzies* it was applied to an agreement of an association of stevedores in San Francisco, "to govern and control the business of master stevedores, to be carried on by its members," with a provision for fixing prices to be charged by members, it not appearing that the parties controlled the business of stevedoring in San Francisco, to the extent of ability to exclude competition or control prices, or that they comprised more than an insignificant fraction of those engaged there in the business. See *Over v. Byram Foundry Co.*, 37 Ind. App. 452; 77 N. E. 302; 117 Am. St. Rep. 327 (1906). See under Federal act, § 193; under New York act, § 224. There are some comparatively early decisions that go to the extent of holding that an agreement to fix prices is not illegal, even if among those in substantial control of the supply. Thus, in *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant (Ontario), 540 (1871; salt), notwithstanding the admission that "prices might possibly be influenced by it." So in *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E.

629 (1887), of a combination among manufacturers and sellers of curtain fixtures known as "wood balance shade rollers," though they were the principal dealers and substantially supplied the market. So held even on the assumption that the agreement tended to raise the price. So in *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. 553 (Ct. N. Y., 1886), was sustained an agreement between two manufacturers of washing-machines, they being the principal, but not the only, manufacturers in this country, for a division of profits on sales, upon the basis of a fixed price. It is clear that these authorities would not now be generally followed.

⁴³ Thus, in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 186; 8 Am. Rep. 159, 165 (1871), the five coal companies which combined to fix the price of coal were the sole dealers in the region affected. The court said: "Singly each might have suspended deliveries and sales of coal, to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. . . . But . . . this combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence." So in *Chicago, Wilmington, etc., Coal Co. v. People*, 214 Ill. 421; 73 N. E. 770 (1895), of an agreement among

price, though a frequent incident of a restriction upon competition, is of no consequence, from a legal standpoint, save as affecting the manner in which the question of illegality arises,

those including the larger producers of coal in northern Illinois. So in *Drake v. Siebold*, 81 Hun, 178; 30 N. Y. Suppl. 697 (1894), the agreement to fix the price of coal, held illegal, was among all the coal dealers in Rochester, except a few small dealers who sold by the bushel. So held under the statute (now Penal Code, § 168, subd. 6) against a conspiracy "to commit any act injurious to trade or commerce." So in *Hoffman v. Brooks*, 23 Am. Law Reg. (N. S.) 648 (Super. Ct., Cin., 1884), the agreement held illegal was among the owners of the leaf-tobacco warehouses in Cincinnati, for fixing rates of service, the business being of great magnitude in that city, and that being the largest market for such business in the United States. So in *People v. Milk Exchange*, 145 N. Y. 267; 39 N. E. 1062; 27 L. R. A. 437; 45 Am. St. Rep. 609 (1895), though it does not clearly appear how large a percentage of the dealers were included in the combination in question, yet the prices of milk as fixed by it had "largely controlled the market in and about the city of New York, and of the milk-producing territory contiguous thereto." In *Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292; 59 N. E. 906 (1901), the agreement held illegal was between, on the one hand, a combination of those manufacturing 85 per cent. of the envelopes manufactured in this country, and, on the other, a comparatively small manufacturer outside the combination. There were similar contracts

between the combination and all other considerable outside producers. So in *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 177, 189 (C. C. N. Y., 1905), of a combination to fix the price of books, among at least 90 per cent. of both publishers and sellers of copyrighted books in the United States. In *U. S. v. American Tobacco Co.*, 164 Fed. 700, 720 (C. C. N. Y., 1908), the parties to the combination were said to "so engross the market" (see §§ 193, 198), as to be able to "at pleasure fix the prices." To the same rule seems referable *Lovejoy v. Michels*, 88 Mich. 15; 49 N. W. 901; 13 L. R. A. 770 (1891), where, in applying the rule that, in the absence of agreement as to the price of goods sold, the price shall be a reasonable one, it was held error to allow as the price, or even consider as evidence of value, the price fixed by a combination of manufacturers, to which the plaintiff belonged, and which substantially controlled the supply. And the following are cases of agreements held illegal as fixing prices, where the parties seem, though it does not always appear, to have constituted a substantial portion of the dealers in the commodity. But, if otherwise, they are to be classed with the cases cited in note 45, infra. *Leonard v. Poole*, 114 N. Y. 371; 21 N. E. 707; 4 L. R. A. 728; 11 Am. St. Rep. 667 (1889; lard); *De Witt Wire-Cloth Co. v. N. J. Wire-Cloth Co.*, 16 Daly, 529; 14 N. Y. Suppl. 227; affirmed, it seems, in 38 N. Y. State Reporter, 1023

thus in a proceeding to enforce such an agreement.⁴⁴ *A fortiori* is this the case as to merely *fixing* the price. Nevertheless, the view that agreements to fix price are inherently illegal has not infrequently been expressed, and even acted upon,⁴⁵ though in some instances the illegality has been regarded as confined to an agreement to fix an *unreasonable* price.⁴⁶

(1891; wire-cloth); *Richardson v. Buhl*, 77 Mich. 632, 657; 43 N. W. 1102, 1110; 6 L. R. A. 457, 465 (1889; friction matches); *Cummings v. Foss*, 40 Ill. App. 523 (1891); confirmed in subsequent decision in *Foss v. Cummings*, 149 Ill. 353; 36 N. E. 553 (1894; corn; the opinion was here expressed that the combination was in violation of the Illinois statute making it a penal offense to "corner the market or attempt to do so"); *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 288; 29 C. C. A. 141, 157; 46 L. R. A. 122, 134 (6th C., 1898); affirmed in 175 U. S. 211, 237; 20 Supm. 96, 106; 44 L. Ed. 136 (1899). See *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 43 Atl. 273; 46 L. R. A. 255; 78 Am. St. Rep. 612 (1899). In *National Harrow Co. v. Bement*, 21 App. D. 290, 294; 47 N. Y. Suppl. 462, 466 (1897), a provision in a license to manufacture and sell under a patent, whereby the licensor reserved the right to decrease the prices as fixed, was held illegal, against the contention that authority was not given to increase the price, it appearing that the prices as fixed were far above the selling price. As to reversal, see § 120. That for the purpose of making illegal the fixing of price by those in substantial control of the supply, it is not necessary that the price fixed be unreasonable, see § 121. As to sufficiency

of indictment for combination to fix price, see *State v. Eastern Coal Co.*, 70 Atl. 1 (Supm. Ct. R. I., 1908).

⁴⁴ See § 167.

⁴⁵ This seems to be the ground of the decision in *More v. Bennett*, 140 Ill. 69; 29 N. E. 888; 15 L. R. A. 361; 33 Am. St. Rep. 216 (1892), declaring illegal an association of law stenographers, having as its object to control the prices to be charged by its members for stenographic work, by restraining all competition among them. And in the following cases it does not appear that the agreements condemned were among persons constituting a substantial portion of the dealers: *Urmston v. Whitelegg*, 63 L. T. R. N. S. 455 (1890; manufacturers of mineral waters); *Sayre v. Louisville Union Benev. Assoc.*, note 46, *infra*. See also decisions, note 43, *supra*.

⁴⁶ Thus, in *Herriman v. Menzies*, 115 Cal. 16; 46 Pac. 730; 35 L. R. A. 318; 56 Am. St. Rep. 82 (1896), the agreement was sustained, it not appearing that the prices fixed were unreasonable, or the restriction "such as to preclude a fair competition with others engaged in the business," though there is another and distinct ground for the decision, namely, that the parties did not control the business. See note 42, *supra*. So, in *Sayre v. Louisville Union Benev. Assoc.*, 1

§ 126. **Agreement to fix wages.**—In connection with agreements to fix price we may profitably consider the true basis of the doctrine of the invalidity of agreements to fix wages, that is, the price of labor. The doctrine was originally established as an application of the general law of conspiracy. So far as it rests on the ground, it has, as we have elsewhere seen, been repudiated, if indeed it is to be regarded as ever having existed. But there seems to be ground for saying that the validity of an agreement to fix wages, that is, the price of labor, should be determined by whatever test is applicable to other agreements to fix price.⁴⁷ In this view, there is nothing inherently illegal in

Duvall (Ky.), 143; 85 Am. Dec. 613 (1863), where a by-law of an association of captains and owners of steamboats on the Ohio and Mississippi rivers, forbidding any member to carry freight for "less than the established rate in the trade," was held illegal. Such rate seems to have been fixed by the association. The court said: "The members agreed that no one should carry freight for less than the rate fixed by the association, without reference to the question whether the rate was reasonable or not." But in *Raritan River R. R. Co. v. Middlesex, etc., Traction Co.*, 70 N. J. Law, 732; 58 Atl. 332 (1904), was sustained an agreement by a railroad corporation with a competitor "not to lower its present rates of fare unless required by law." In *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant (Ontario), 540, 544 (1871), the agreement was sustained as having for its object, "not unduly to enhance the price, but to enable the parties by concerted action to combat an attempt on the part of foreign producers and manufacturers unduly to depreciate it."

⁴⁷ See *Sayre v. Louisville Union Benev. Assoc.*, 1 Duvall (Ky.), 143;

85 Am. Dec. 613 (1863), where, though the question was as to prices rather than wages, the court doubted the soundness of the extreme positions, on the one hand, that combinations to raise wages are legal, and, on the other hand, that they are not, applying the test of *reasonableness* of the wages sought to be obtained as a result of the combination. Here a by-law of an association forbidding members to carry freight for less than the rate fixed by the association, was held illegal, on the ground that the agreement had no reference to the question whether the rate was reasonable or not. Compare *Queen Ins. Co. v. State*, 86 Tex. 250, 272; 22 L. R. A. 483, 494; 24 S. W. 397, 405 (1893). The distinction stated in the text was, however, disregarded in *People v. Fisher*, 14 Wend. (N. Y.) 9; 28 Am. Dec. 501 (1835), holding unlawful a combination to raise wages. There was nothing to show that such combination tended to create a monopoly. The court stated several hypothetical cases of monopolies produced by combinations to raise wages, and added: "Such consequences would follow were such

an agreement to fix wages, though it may be otherwise where the agreement is an incident of an illegal restriction upon competition. That is to say, the employees or other parties to the agreement may be in substantial control of the supply of the particular kind of labor affected by the agreement,⁴⁸ thus of an agreement among all the railroad employees within a given district.

§ 127. **Deterioration in quality.**—What has just been said as to fixing of price as an element of illegality of a restriction upon competition is applicable to the second so-called “inseparable incident,” deterioration in quality.⁴⁹ That is to say, while deterioration in quality is doubtless sometimes an incident, it certainly is not an *inseparable* incident of a monopoly resulting from the acts of individuals. And not only is deterioration in quality not a necessary incident of an illegal restriction upon competition, but it furnishes no adequate test of the legality of such a restriction.

§ 128. **Forcing out of, or preventing from entering employment.**—What has just been said as to two so-called “inseparable incidents” is applicable to a third not commonly relied on, but still one on which considerable stress has been laid, that is, the injury to those forced out of or prevented from entering the same line of business.⁵⁰ It may be a question for the econo-

combinations universal. It is true that no great danger is to be apprehended, on account of the impracticability of such universal combinations. But if universally, or even generally, entered into, they would be prejudicial to trade and to the public, *they are wrong in each particular case.*” See articles in 16 Harv. Law Rev. 236 (1902-3) by E. F. McClennen; 20 Id. 253, 345, 428 (1907) by Jeremiah Smith.

⁴⁸ See, under Mich. (§ 217), Hunt v. Riverside Co-operative Club, 140 Mich. 538; 104 N. W. 40; 112 Am. St. Rep. 420 (1905). Compare under Iowa (§ 211).

⁴⁹ In *Darcy v. Allein*, 11 Coke, 84b, it was said that, as another “inseparable incident,” “after the monopoly granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the common wealth.” See also *People ex rel. v. American Sugar Refining Co.*, 7 Ry. & Corp. L. J. 83 (Super. Ct. San Francisco, 1890).

⁵⁰ In *Darcy v. Allein*, 11 Coke, 84b, it was said that, as another “inseparable incident,” “it tends to the impoverishment of divers artificers and others, who be-

mist, rather than the jurist, whether, from the standpoint of the public interest, this injury is outweighed by benefits. With reference to such incident it has been said:⁵¹ "The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers and the great body are merely employees or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production, as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime."

§ 129. **Combination as element of illegality.**—It scarcely needs pointing out that the existence of the element of combination in no way necessarily involves the existence of an illegal restriction upon competition. Otherwise every partnership, indeed, co-operation under any form, would be illegal.⁵² But it

fore, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary; and the common law . . . agrees also with the civil law."

⁵¹ *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137, 187; 30 N. E. 279, 290; 15 L. R. A. 145, 159; 34 Am. St. Rep. 541, 554 (1892), referring to the ground as stated in *Darcy v. Allein*, *supra*. Similar views were expressed in *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596; 49 N. E. 1030; 41 L. R. A. 185; 63 Am. St. Rep. 736 (1898). So, in *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 324; 17 Supm. 540, 552; 41 L. Ed. 1007 (1897), was emphasized the public misfortune caused by the loss of the "services of a large number of small but independent dealers." See *Harding v. Amer-*

ican Glucose Co., 182 Ill. 551, 604; 55 N. E. 577, 595; 64 L. R. A. 738, 759; 74 Am. St. Rep. 189 (1899); *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, 623; 53 C. C. A. 256, 269 (6th C., 1902). For prohibition against acts designed to compel competitors "to go out of business," see under *Ind.* (§ 210).

⁵² See *Fechteler v. Palm*, 133 Fed. 462, 471; 66 C. C. A. 336, 345 (6th C., 1904). Thus a contract for exchange of freight was held not illegal, in *Graham v. Macon*, Dublin, etc., R. R. Co., 120 Ga. 757; 49 S. E. 75 (1904). The difficulty of establishing a sharp line of distinction in such cases, was seen in *Marsh v. Russell*, 66 N. Y. 288 (1876), where a distinction was taken between a partnership formed for the honest purpose of carrying on a joint business, with the incidental effect of preventing competition, and a partnership the primary

is not so generally and clearly understood that the element of combination is in no sense a necessary incident of such an illegal restriction. What is undoubtedly a prevalent impression to the contrary, fostered by the common use of the terms "combination," "conspiracy" and the like, as applicable to such restrictions, seems to result from the circumstance that such restrictions upon competition as have hitherto been subjected to judicial scrutiny, have ordinarily actually resulted from "combinations" or "conspiracies" among individuals, partnerships or corporations. But suppose the case of a corporation or mere individual obtaining the substantial control of the supply of a given commodity, the restriction thus produced is, in the view here taken, just as illegal as if it had resulted from a "combination" or "conspiracy."⁵³

object of which is to prevent competition. But this introduces the uncertain test of *intent*, as to which see § 9. In *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant (Ontario), 540, 544 (1877), the court answered the objection that an agreement among manufacturers of salt for sale of their stock through a common agency, tended to create a monopoly, by saying: "If the effect was to constitute a partnership, there can be nothing objectionable in the stipulation that all the salt produced—which is to form the partnership stock—should be sold through the agency of the trustees." Compare as to "pools," § 137. But that a secret partnership is illegal, if there is maintained the appearance of competition among the partners for the purpose of deceiving the public, see *Firbank v. Leary*, 40 Wis. 637, 643 (1876). See *State v. Adams Lumber Co.*, 116 N. W. 302 (Supm. Ct. Neb., 1908), as to liability of association as a whole for acts of its members in restriction upon competition.

⁵³ Thus in *State v. Eastern Coal Co.*, 70 Atl. 1, 4 (Supm. Ct. R. I., 1908), in holding not illegal a combination to fix the price of coal, certain decisions discussed were distinguished on the ground of it there appearing that "the objects of the combinations criticised, if they could have been attained by individuals, would have been unlawful. Hence the combination to secure these objects was criminal." See, however, opinions of Holmes and White, J.J., in *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Supm. 436; 48 L. Ed. 679 (1904); also *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 191 (C. C. N. Y., 1905).

The assumption that *combination* is an essential element of an illegal restriction upon competition is frequently manifest in the anti-trust acts. Thus in the frequent definition of a "trust" as a "*combination*," etc., for specified purposes; so in the use of such words as "*confederation*," "*conspiracy*," "*contract*," "*arrangement*," and the like. See c. XX. For a good illustration of the

§ 130. **What may be subject of illegal restriction; e. g., tangible commodities; services.**—The doctrine of the illegality of restrictions upon competition has been more commonly applied to tangible commodities. In the anti-trust acts such commodities have been variously characterized, not only as “commodities,” but as “merchandise,” “produce,” “products,” “articles,” “property,” “article of trade,” “article of commerce,” “article of manufacture” and the like.⁵⁴ And, although the doctrine has been more commonly applied to what is strictly or in a narrower sense a mere sale, it has a broader application.⁵⁵ In the anti-trusts acts have been characterized as within the doctrine “manufacture,” “making,” “mining,” “exchange,” “traffic,” “production,” “importation,” “constructing,” etc. But the doctrine is applicable not only to tangible commodities, but to services,⁵⁶ thus notably that of transportation. The prohibition

effect of such assumption, see under Mich. (§ 217). As to meaning of “combination,” see under Tex. (§ 232); of “combining,” under N. Y. (§ 224). As to application of prohibition against “combination,” etc., to mere arrangement between employer and employee, see *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 460; 60 C. C. A. 290, 296; 64 L. R. A. 689, 697 (8th C., 1903).

⁵⁴ In some instances special classes of articles, agricultural, manufactured, or the like, are specified; so in some instances, articles of domestic production, in others imported articles. So frequently are specified particular commodities such as live-stock, grain, lumber, coal, machinery, etc. See c. XX.

⁵⁵ That it is not confined to “transactions of trade and commerce strictly so called,” see *McCarter (Attorney General) v. Firemen's Ins. Co.*, 70 N. J. Eq. 291; 61 Atl. 705 (1905), where the question was as to rates of premium for insurance. In *People v. Aachen & Munich*

Fire Ins. Co., 126 Ill. App. 636 (1906), it was applied to a combination to fix rates of insurance.

⁵⁶ Thus professional services. It was, however, said in *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997, 1002 (Supm. Ct. Mo., 1908), citing *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 456; 60 S. W. 91, 104; 51 L. R. A. 151, 166; 81 Am. St. Rep. 368 (1901), that “at common law personal service—an occupation—could not be the subject of a monopoly.” See under Iowa (§ 211). Compare the numerous prohibitions against combinations among railroad and other carriers, thus pooling combinations; so prohibitions relating to particular kinds of business, such as the express or insurance business, or that of gathering news items, loaning money, etc. See c. XX.

As to whether “commodity” as the term is used in a statute, includes service of transmission by telegraph, see under N. Y. (§ 224).

of the acts has been commonly expressly applied to combinations of "skill or acts," or the like, as well as of "capital."

§ 131. **Articles of necessity.**—The view has been frequently expressed that the doctrine against restrictions upon competition is limited to *articles of necessity*, as distinguished from what may be termed articles of luxury.⁵⁷ If such a dis-

⁵⁷ The limitation seems to have crept in without much observation, and to be based on the view expressed in *Pettamberdass v. Thackoorseydass*, 7 Moore P. C. C. 239, 262 (1850), that "ingrossing can be committed only with respect to the necessities of life." In *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401; 58 N. E. 525; 52 L. R. A. 262; 79 Am. St. Rep. 655 (1900), a distinction was suggested between a civil action and a criminal proceeding, it being here said that "in a civil action prime necessity need not be shown." Applying the limitation above stated, a restriction upon competition in the production of curtain fixtures known as "wood balance shade rollers," was sustained in *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629 (1887). So of fish glue, in *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 94; 27 N. E. 1005, 1006; 12 L. R. A. 563, 564; 26 Am. St. Rep. 214, 216 (1891). So of washing-machines. *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. 553 (C. C. N. Y., 1886). See as to tobacco, *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 460; 60 C. C. A. 290, 296; 64 L. R. A. 689, 697 (8th C., 1903). See remarks of *Lacombe, J.*, in *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 644; 14 C. C. A. 14, 21 (2d C., 1895); also

Queen Ins. Co. v. State, 86 Tex. 250, 271; 24 S. W. 397, 404; 22 L. R. A. 483, 494 (1893), holding the limitation inapplicable to a combination among insurance companies to fix rates of insurance and agents' commissions. In *Meredith v. N. J. Zinc & Iron Co.*, 55 N. J. Eq. 211, 221; 37 Atl. 539, 543 (1897); affirmed in 56 N. J. Eq. 454; 41 Atl. 1116 (1897), it was held applicable to zinc ore, characterized as "property which in its natural state is of no use to mankind, and which, after it has been manufactured and made fit for use, can hardly be classed as a necessity."

The following are cases where restrictions have been held invalid as relating to articles of necessity: As to coal: *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 116 (1904); *Drake v. Siebold*, 81 Hun, 178; 30 N. Y. Suppl. 697 (1894); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 184; 8 Am. Rep. 159, 163 (1871); see *State v. Eastern Coal Co.*, 70 Atl. 1 (Supm. Ct. R. I., 1908). Wheat: *Samuels v. Oliver*, 130 Ill. 73; 22 N. E. 499 (1889); *Raymond v. Leavitt*, 46 Mich. 447; 41 Am. Rep. 170 (1881). Corn: *Cummings v. Foss*, 40 Ill. App. 523 (1891); confirmed in subsequent decision in *Foss v. Cummings*, 149 Ill. 353; 36 N. E. 553 (1894). Friction matches: *Richardson v. Buhl*, 77 Mich. 632, 657;

inction exists, its application would seem to be somewhat difficult and to depend on varying conditions, such, for instance, as those of climate. But the distinction seems never to have been very firmly established in our jurisprudence, and the present tendency seems to be in favor of repudiating it as inapplicable to any lawful business.⁵⁸

43 N. W. 1102, 1110; 6 L. R. A. 457, 466 (1889). *Alcohol: State v. Nebraska Distilling Co.*, 29 Neb. 700, 718; 46 N. W. 155, 161 (1890). *Harrows: National Harrow Co. v. Bement*, 21 App. D. 290, 296; 47 N. Y. Suppl. 462, 467 (1897). *Ice: Tuscaloosa Ice Manuf. Co. v. Williams*, 127 Ala. 110; 28 So. 669; 50 L. R. A. 175; 85 Am. St. Rep. 125 (1900).

In *Bailey v. Master Plumbers*, 103 Tenn. 99; 52 S. W. 853; 46 L. R. A. 561 (1899), the doctrine was applied to articles ordinarily furnished by plumbers; so as to work done by them. Here, however, the use of many such articles was required by a municipal ordinance. But in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 43 Atl. 723; 46 L. R. A. 255; 78 Am. St. Rep. 612 (1899), it was regarded as doubtful whether sanitary pottery ware is an article of necessity. As to whether proprietary drugs and medicines are such articles, see *Park v. National Wholesale Druggists' Assoc.*, 54 App. D. 223, 226; 66 N. Y. Suppl. 615, 617 (1900); affirmed in 175 N. Y. 1 (see pp. 15, 41); 67 N. E. 136 (see pp. 141, 151); 62 L. R. A. 632 (see pp. 639, 649); 96 Am. St. Rep. 578 (1903). In *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 519; 56 S. E. 264, 269; 10 L. R. A. N. S. 268, 280; 116 Am. St. Rep. 401 (1907), it was held unnecessary to

determine whether coke is such an article. In *Cravens v. Carter-Crume Co.*, 92 Fed. 479; 34 C. C. A. 479 (6th C., 1899), the restriction was held invalid as relating to wooden dishes, "articles in common use." See *Herriman v. Menzies*, 115 Cal. 16, 21; 46 Pac. 730, 731; 35 L. R. A. 318, 319; 56 Am. St. Rep. 82 (1896).

⁵⁸ It was repudiated in *Hoffman v. Brooks*, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cin., 1884), where an agreement for fixing rates for services by tobacco warehousemen, was held void, and the court said: "Although courts may be inclined to apply this rule more strictly in cases involving the necessities of life or services of a *quasi*-public nature, there is no authority for excepting from its operations any legitimate trade or business." See also, as to tobacco, *Commonwealth v. Strauss*, 191 Mass. 545; 78 N. E. 136; 11 L. R. A. N. S. 968 (1906). It was also repudiated in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 286; 29 C. C. A. 141, 156; 46 L. R. A. 122, 133 (6th C., 1898), where, however, it was regarded as unnecessary to decide the question, the articles under consideration, viz., water, gas and sewer pipes, being regarded as articles of necessity. So in *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 437; 41 S. E. 553, 556; 57 L. R. A. 547, 552; 90 Am. St. Rep. 126 (1902); *Chip-*

§ 132. **Business of public character.**—The illegality of a restriction upon competition has not infrequently been regarded as based on the circumstance of such competition being in business of a public character, that is to say, irrespective of whether it would be illegal according to the test of extent. In this view a restriction not illegal according to the test of extent might be so on the ground of being upon competition in business of a public character. "Whatever tends to prevent competition between those engaged in a public employment, or business im-

pewa Lumber Co. v. Tremper, 75 Mich. 36; 42 N. W. 532; 4 L. R. A. 373; 13 Am. St. Rep. 420 (1889; intoxicating liquors); De Witt Wire-Cloth Co. v. N. J. Wire-Cloth Co., 16 Daly, 529; 14 N. Y. Suppl. 277; affirmed, it seems, in 38 N. Y. State Reporter, 1023 (1891; wire cloth); People v. Duke, 19 Misc. 292 (N. Y. Co. Gen. Sess. 1897; cigarettes); Nester v. Continental Brewing Co., 161 Pa. St. 473; 29 Atl. 102; 24 L. R. A. 247; 41 Am. St. Rep. 894 (1894; beer). See also Pocahontas Coke Co. v. Powhatan Coal & Coke Co., note 57, supra. But in Anheuser-Busch Brewing Assoc. v. Houck, 27 S. W. 692 (Tex. Civ. App., 1894); affirmed as Houck v. Anheuser-Busch Brewing Assoc., 88 Tex. 184; 30 S. W. 869 (1895), where a restriction as to beer was held unlawful under the statute, it was said that it would not have been invalid at common law, the policy of the laws of the State not being toward the unrestricted or general sale of beer. Compare Nester v. Continental Brewing Co., supra. In Cummings v. Union Blue Stone Co., 15 App. D. 602; 44 N. Y. Suppl. 787 (1897), a combination to control the bluestone trade was held void, though there is no such general need or

demand for bluestone, as to bring it within the category of articles of necessity, in the ordinary sense. On affirmance in 164 N. Y. 401; 58 N. E. 525; 52 L. R. A. 262; 79 Am. St. Rep. 655 (1900), it was said: "The stone had been for many years and still is in use for sidewalks, crossings, curbings and gutters in the eastern and southern cities of the United States, and in the construction of bridges, fountains, basins, floors and for trimmings in the exterior walls of buildings and for various other purposes. Its fitness and serviceability for these purposes were shown and the evidence also tended to show that in these respects it had no superior in the New York market." In Straus v. American Publishers' Assoc., 177 N. Y. 473; 69 N. E. 1107; 64 L. R. A. 701; 101 Am. St. Rep. 819 (1904), a restriction relating to books was held invalid under the act of 1899, apparently without reference to the distinction.

As to effect of Texas act, see § 232.

In the New York act (§ 224), is specified "any necessary of life." Compare the frequent specification of articles of common (or general) use, or the like. See under the different acts, c. XX.

pressed with a public character, is opposed to public policy and therefore unlawful.”⁵⁹ “In the instance of business of such character that it presumably cannot be restrained to any extent whatever, without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy.”⁶⁰ Just what a business of a “public character” is, has perhaps not been

⁵⁹ *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268, 293; 22 N. E. 798, 803; 8 L. R. A. 497, 505; 17 Am. St. Rep. 319, 332 (1889). In many cases where the doctrine is recognized as applying to “contracts in restraint of trade,” the statement may be understood as intended to apply to restrictions upon competition, in view of the frequent confounding of these two classes of cases; or if this be not the case, the courts applying it to contracts in restraint of trade would doubtless apply it to restrictions upon competition pure and simple.

⁶⁰ *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 408; 9 Supm. 553, 557; 32 L. Ed. 979 (1889). To similar effect, *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 625; 46 Am. Rep. 527, 535 (1883), where it was held illegal for the corporation to make a grant of an *exclusive* right of way and privilege, to construct and maintain lines of tubing, for the transportation of oil through certain lands. See *Calor Oil & Gas Co. v. Franzell*, 109 S. W. 328 (Ct. App. Ky., 1908). And the same doctrine was recognized or applied in *South Chicago City Ry. Co. v. Calumet Electric Street Ry. Co.*, 171 Ill. 391, 397; 49 N. E. 576, 578 (1898); *Dunbar v. American Telephone, etc., Co.*, 87 N. E. 521, 533 (Supm. Ct. Ill., 1909); *Texas & Pa-*

cific Ry. Co. v. Southern Pacific Ry. Co., 41 La. Ann. 970; 6 So. 888; 17 Am. St. Rep. 445 (1889); *Cowan v. Fairbrother*, 118 N. C. 406; 24 S. E. 212; 32 L. R. A. 829; 54 Am. St. Rep. 733 (1896); *Queen Ins. Co. v. State*, 86 Tex. 250, 269, 274; 24 S. W. 397, 403, 406; 22 L. R. A. 483, 493, 495 (1893). It seems to be recognized in *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 335; 17 Supm. 540, 556; 41 L. Ed. 1007 (1897), though there the restriction under consideration was held illegal by virtue of statute. Here, where the question was as to the legality of an agreement among railroad companies for the establishment of rates, the court said: “The general reasons for holding agreements of this nature to be invalid, even at common law, on the part of railroad companies, are quite strong, if not entirely conclusive.” It seems also to be recognized in *State ex rel. v. Portland Natural Gas & Oil Co.*, 153 Ind. 483; 53 N. E. 1089; 53 L. R. A. 413; 74 Am. St. Rep. 314 (1899), though the decision is sustainable on the ground that the restriction was complete. In *Chicago, Indianapolis, etc., Ry. Co. v. Southern Indiana Ry. Co.*, 38 Ind. App. 234; 70 N. E. 843 (1904), was condemned an agreement between two competing railroad corporations by which one precluded itself from furnishing fa-

very clearly defined, but it seems to involve the conception of a business the right to exercise which depends on a legislative grant,⁶¹ in particular, of the power of eminent

ciities for transportation by means of the location of certain side tracks. So in *Keene Syndicate v. Wichita Gas, Electric Light & Power Co.*, 69 Kan. 284; 76 Pac. 834; 67 L. R. A. 61; 105 Am. St. Rep. 164 (1904), of a lease between corporations engaged in furnishing electricity for public and private use, it being provided therein that the lessor should not for ten years engage in such business or dispose of property for use in such business. Compare *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 644; 14 C. C. A. 14, 21 (2d C., 1895); *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 460; 60 C. C. A. 290, 296; 64 L. R. A. 689, 697 (8th C., 1903). In *Cleveland, Columbus, Cincinnati, etc., Ry. Co. v. Closser*, 126 Ind. 348, 360; 26 N. E. 159, 163; 9 L. R. A. 754, 760;

22 Am. St. Rep. 593, 603 (1890), the court, while inclined to take the same view, contented themselves with the *presumption* that the restriction in that case (upon competition by common carriers) was illegal. See dissenting opinion of Shiras, J., in *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. 58, 84; 7 C. C. A. 15, 88; 24 L. R. A. 73, 91 (8th C., 1893). See also *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.*, 8 Del. Ch. 468, 517; 46 Atl. 12, 24 (1900); *Over v. Byram Foundry Co.*, 37 Ind. App. 452; 77 N. E. 302; 117 Am. St. Rep. 327 (1906); *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272; 47 N. W. 806; 11 L. R. A. 437 (1891); *Meredith v. N. J. Zinc & Iron Co.*, 55 N. J. Eq. 211, 221; 37 Atl. 539, 543 (1897); affirmed in 56 N. J. Eq. 454; 41 Atl. 1116 (1897).

⁶¹ Thus, supplying illuminating gas by means of pipes laid in the streets of a city. *People ex rel. v. Chicago Gas Trust Co.*, note 59, supra; *Gibbs v. Consolidated Gas Co. of Baltimore*, note 60, supra; *State ex rel. v. Portland Natural Gas & Oil Co.*, note 60, supra. So of supplying natural gas. *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22; 50 S. E. 876; 112 Am. St. Rep. 936 (1905). In *Gibbs v. Consolidated Gas Co.*, it was said (130 U. S. 411; 9 Supm. 558): "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public pur-

poses to subserve which they were incorporated." So, transportation of oil in tubes. *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600; 46 Am. Rep. 527 (1883). So, transportation by railroad. *Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co.*, 41 La. Ann. 970; 6 So. 888; 17 Am. St. Rep. 445 (1889); *U. S. v. Trans-Missouri Freight Assoc.*, infra. See *Michigan Central R. R. Co. v. Pere Marquette R. R. Co.*, 128 Mich. 333; 87 N. W. 271 (1901). So furnishing electricity. *Keene Syndicate v. Wichita Gas, Electric Light & Power Co.*, note 60, supra. That the business of conducting a hotel is not a *business* of a public character, see *Wittenberg v. Mollyneaux*,

domain.⁶² This test of legality has usually been applied to business conducted by corporations and the legitimate scope of such test would seem to be, at most, but a narrow one. In most, even if not all, instances the illegality of the action of a corporation in imposing such a restriction would seem sufficiently based on the circumstance of such action not being within the authority conferred by its charter.⁶³ Again, in many instances it may

In *Central N. Y. Telephone, etc., Co. v. Averill*, 105 N. Y. Suppl. 378 (Supm. Ct., Sp. T., 1907), was condemned a provision in a contract for telephone service in a hotel, that the corporation furnishing the service should have the exclusive right to place telephones in the hotel. It seems to us that this should have been sustained as merely a contract for exclusive service. See § 140. It was here said: "This is not because the corporation is a public one, or a common carrier, or because it possesses the rights of eminent domain, but because of the rule that, where a contract is alleged to be in restraint of trade, the public welfare is to be first considered, and if it be found involved, the contract is to be de-

clared void. This rule does not apply to any one class of corporations or any one class of individuals. It applies to all. And while it may very well be that a semi-public corporation may be unable to make contracts that would be perfectly valid if made by an individual or by a private corporation, the reason is, not that certain powers are conferred upon the former, but because by the very nature of its operations public interests are more likely to be affected." Relief against such contract was, however, denied in subsequent decision in 129 App. D. 752, 762; 114 N. Y. Suppl. 99, 106 (1909), it being said: "So far as appears, only the parties to the agreement are affected by it."

60 Neb. 583; 83 N. W. 842 (1900). But the business of the Associated Press, a corporation extensively engaged in the business of collecting news and furnishing it to daily newspapers held a public one, so that provisions in its by-laws and in a contract between it and a customer, prohibiting the latter from obtaining news from other sources, were held an unlawful restriction upon competition. Some stress was laid on the circumstance of such corporation having the power of eminent domain, which, however, it had not exercised. *Inter-Ocean Publishing Co. v. Associated Press*,

184 Ill. 438; 56 N. E. 822; 48 L. R. A. 568; 75 Am. St. Rep. 184 (1900). See editorial note thereon in 34 Am. Law Rev. 284 (1900). As to what is "public business" under Oklahoma act, see § 228.

⁶² As, however, to whether the conception of business of a public character necessarily involves possession of the right of eminent domain, see *Central N. Y. Telephone, etc., Co. v. Averill*, note 60, *supra*.

⁶³ As said in the dissenting opinion of White, J., in *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 373; 17 Supm. 540, 571; 41 L. Ed. 1007 (1897): "The fallacy

suffice to apply the rule that "a corporation cannot disable itself by contract from performing the public duties which it has undertaken and by agreement compel itself to make public accommodation or convenience subservient to its private interests."⁶⁴ Apart, however, from these considerations, and assuming the existence of a legitimate scope for such test, it seems a reasonable view that the rule condemning a restriction in business of a public character at most furnishes a *presumption*⁶⁵ of the illegality of a particular restriction. In this view such restriction may be sustained as legal, upon it appearing that "the

consists in overlooking the distinction between acts of a public corporation which are *ultra vires* and those which are not. If the contract of such a corporation which is assailed be *ultra vires*, of course the question of reasonableness becomes irrelevant, since the charter is the reason of the being of the corporation." And it was here pointed out that in *Gibbs v. Consolidated Gas Co. of Baltimore*, note 60, *supra*, and cases therein cited, *ultra vires* contracts were under consideration. *Chicago, St. Louis, etc., R. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79; 11 Supm. 490; 35 L. Ed. 97 (1891), was cited as a case where such a restraint was upheld. This view (of White, J.) is sustained by the facts in the cases wherein the doctrine has been laid down. Thus, in *Gibbs v. Consolidated Gas Co. of Baltimore*, the restriction in question, created by a contract between two gas companies, was expressly prohibited by statute. So *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. 798; 8 L. R. A. 497; 17 Am. St. Rep. 319 (1889), can be explained on the ground of the absence of power in the defend-

ant corporation to hold the stock of other gas companies, in the absence of express statutory authority. In 36 Am. Law Reg. & Rev. 307, 319 (1897), the authorities are discussed by G. S. Patterson, and the conclusion reached that "there is no business, whatever be the public interest therein, that any restraint thereon is *ipso facto* void; but if the effect of the restraint be to form a monopoly of such business, or to prevent a public corporation from the performance of its chartered functions, then the agreement is void."

⁶⁴ *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 410; 9 Supm. 553, 558; 32 L. Ed. 979 (1889). The decision herein might well have rested on the ground that the contract provided for the abandonment by one of the companies of the discharge of its duties to the public, to say nothing of the general rules applicable to restrictions upon competition. See dissenting opinion of White, J., in *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 373; 17 Supm. 540, 571; 41 L. Ed. 1007 (1897).

⁶⁵ See *Gibbs v. Consolidated Gas Co. of Baltimore*, note 64, *supra*.

public is not injured" thereby,⁶⁶ each case that arises to "be decided upon its own merits and upon the particular circumstances developed."⁶⁷

§ 133. **Reasonableness as test of legality.**—It will be seen that, in determining the legality of contracts in restraint of trade it is the test of reasonableness that, though introduced comparatively recently, is now generally applied.⁶⁸ What we shall see to be the fallacy that the basis of such doctrine is the prevention of restrictions upon competition seems not unnatu-

⁶⁶ *Central N. Y. Telephone, etc., Co. v. Averill*, 105 N. Y. Suppl. 378 (Supm. Ct., Sp. T., 1907), where it was said that just so long as the public is not injured "any fair and reasonable contract of such a character is perfectly valid." See note 60, *supra*. In this view, it seems to be the test of *reasonableness* hereafter considered (see § 133), that is applicable. Indeed in the decision below in *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. 58, 74; 7 C. C. A. 15, 78; 24 L. R. A. 73, 85 (8th C., 1893), it was contended that restrictions upon competition among railroad corporations are subject to the test of reasonableness. See this decision as to the effect of the Interstate Commerce Act. In *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549; 41 Pac. 495; 29 L. R. A. 839 (1895), the restriction in question created by an agreement between a "water company" and a "flume company" was held valid as reasonable. Compare cases sustaining agreements by railroad companies for the location of a route; as, for instance, *Baltimore & Ohio R. R. Co. v. Ralston*, 41 Ohio St. 573, 588 (1885); and compare *McCowen v. Pew*, 153 Cal. 735; 96 Pac. 893 (1908); or of a station;

as, for instance, *Louisville, New Albany, etc., Ry. Co. v. Sumner*, 106 Ind. 55, 59; 5 N. E. 404, 406; 55 Am. Rep. 719, 720 (1886); *Texas & St. Louis R. R. Co. v. Robards*, 60 Tex. 545; 48 Am. Rep. 268 (1883). See, however, *Enid Right of Way, etc., Co. v. Lile*, 15 Okla. 317; 82 Pac. 810 (1905); *Farrington v. Stucky*, 165 Fed. 325 (C. C. A., 8th C., 1908). And for instances of restrictions upon competition by carriers, sustained under the test of reasonableness, see § 133. As to application of doctrine forbidding monopolies, to case (here of gas and electricity) where the State retains and has exercised power "to fix a reasonable price upon the commodity, and to compel its delivery to any person desiring to purchase it," see *Attorney-General v. Consolidated Gas Co.*, 124 App. D. 401; 108 N. Y. Suppl. 823 (1908).

⁶⁷ *Central N. Y. Telephone, etc., Co. v. Averill*, *supra*. In *Whitaker v. Kilby*, 55 Misc. 337; 106 N. Y. Suppl. 511 (1907); affirmed in 122 App. D. 895; 106 N. Y. Suppl. 1149 (1907), was sustained an agreement by a telephone corporation to limit its activities within a certain district.

⁶⁸ See § 159.

rally to have suggested the view that in determining the legality of a restriction upon competition, it is likewise the test of reasonableness that is to be applied.⁶⁹ It has been seen that the generally accepted test of the legality of such a restriction is

⁶⁹ That this is the proper test was elaborately contended for in *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. 58; 7 C. C. A. 15; 24 L. R. A. 73 (8th C., 1893), where was involved the legality of an agreement entered into between fifteen independent and competing railroad companies, extensively engaged in interstate commerce in that part of the United States west of the Mississippi and Missouri rivers. The professed object of the agreement was "mutual protection, by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local." Provision was made for the establishment of such rates, rules and regulations. It was found by the court that the rates maintained under the contract had not been unreasonable, and that many reductions had been made under its operation (58 Fed. 77; 7 C. C. A. 81; 24 L. R. A. 87). The whole discussion is confused by the introduction of the erroneous and needless assumption that the doctrine against restrictions upon competition is based on that against contracts in restraint of trade. It was said (58 Fed. 72; 7 C. C. A. 76; 24 L. R. A. 84): "It is not the *existence* of the restriction of competition, but the *reasonableness* of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade." An attempt was made, though in our view unsuccessfully, to show that the authorities generally that con-

demn restrictions upon competition, are in harmony with this test; it being said (58 Fed. 70; 7 C. C. A. 74; 24 L. R. A. 83): "These decisions rest on the ground that the main *purpose* of the obnoxious contracts was to suppress competition, and that they thus *tended* to effect an unreasonable and unlawful restraint of trade." So also (58 Fed. 69; 7 C. C. A. 73; 24 L. R. A. 83): "The main *purpose* of contracts of these classes that are thus held illegal is to *suppress*, not simply to regulate, competition, and, if suppression is not effected, it is because the contracts fail to accomplish their *purpose*. It is evident that there is a wide difference between such contracts and those the *purpose* of which is to so regulate competition that it may be fair, open and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this *purpose*. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade, because those of the former classes do." This makes the authorities generally rest on the uncertain test of *intent*, as to which see § 9. This decision was reversed in 166 U. S. 290, 373; 17 Supm. 540, 571; 41 L. Ed. 1007 (1897; see §§ 194, 197), without necessarily affecting the soundness of the conclusions of the court below on this point, though the difficulties in the way of a judicial determination of what is a reasonable rate for railroad transportation,

what we have called the test of extent,⁷⁰ the question, according

were forcibly pointed out. The test of reasonableness seems to have been applied in *Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co.*, 61 Fed. 993; 9 C. C. A. 659 (8th C., 1894), where an agreement among seven railroad companies, the Union Pacific, the Chicago, Rock Island & Pacific, the Chicago, Milwaukee & St. Paul, the Wabash, St. Louis & Pacific, the Chicago & Northwestern, the Chicago, St. Paul, Minneapolis & Omaha, and the Missouri Pacific, for a pooling and division of through traffic, was held void as designed to establish rates *without reference to their reasonableness*. There was no evidence of the rates fixed for the traffic involved. This test might perhaps have been applied in *Central Trust Co. v. Ohio Central Ry. Co.*, 23 Fed. 306 (C. C. Ohio, 1885), where a pooling contract among three railroad companies, having reference to their coal business, in respect to which they were competitors, and providing for division of business and earnings in certain fixed proportions, and for fixing the rates of transportation, was sustained as against a receiver of one of the companies. The decision was "without regard to the questions made as to the original validity of the contract." It appears, however, that the contract "afforded to shippers of coal along the lines of the railroads, rates of transportation as low, if not lower, than was charged by any other railroad companies in the State, quantities and distances being equal. The facili-

ties afforded to shippers and the rates for transportation, were uniform and fixed for a definite period. They were not higher than had been charged the public under the sharpest competition existing before the contract was made."

The test was applied in *U. S. v. Joint Traffic Assoc.*, 76 Fed. 895 (C. C. N. Y., 1896), sustaining an agreement among thirty-two railroad companies immensely engaged in competitive interstate commerce, fixing rates, fares and charges, providing for the division of competitive traffic and for the control of soliciting agents. The court said: "These provisions of the contract do not provide for lessening the number of carriers, nor their facilities; nor for raising their rates, except expressly by its terms not contrary to law, and therefore not beyond what are reasonable." So held notwithstanding the provisions of the Federal anti-trust act. But this was reversed in 171 U. S. 505; 19 Supm. 25; 43 L. Ed. 259 (1898; see §§ 194, 197). Compare *Post v. Railroad*, 103 Tenn. 184, 223; 52 S. W. 301, 310; 55 L. R. A. 481, 491 (1899). This test was also applied in *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549; 41 Pac. 495; 29 L. R. A. 839 (1895), sustaining an agreement between a "water company" that owned a complete distributing plant for furnishing water to the city of San Diego, and a "flume company" owning no distributing plant in the city, but water rights, reservoirs and a supply of water outside the city, connected with the distributing

⁷⁰ See § 120.

to this test, being whether the restriction results (or tends to

plant of the other. The agreement provided that the flume company should appoint the water company its sole agent for the exclusive sale of its water within the city, all such sales to be subject to the approval of the flume company, two trustees, one selected from each of the companies, being invested with control of the properties within the city, and a distribution of profits being provided for. The city authorities had constitutional power to fix reasonable rates for water supplied to it. The court said (108 Cal. 559; 41 Pac. 497; 29 L. R. A. 843): "A monopoly is usually, though not necessarily, harmful or injurious to public interests, though, as that term is generally used, injury to the public is implied, and competition is therefore regarded as favorable to the public interest. But there is a competition which tends to monopoly, by driving out all but the stronger competitor, when prices are again increased so as not only to yield a profit upon the original investment, but to recoup the losses incurred in breaking down competitors; or, where the competitors are of equal strength and tenacity of purpose, it may result in the destruction of the public service by the collapse of all of them." And again (108 Cal. 561; 41 Pac. 498; 29 L. R. A. 844): "Public policy does not condemn nor prohibit an arrangement intended to prevent a competition between these corporations, which would inevitably result in the financial ruin of one or both of them, and which could not, in any event, benefit the city or its inhabitants."

The test was also applied in Man-

chester & Lawrence R. R. v. Concord R. R., 66 N. H. 100, 127; 20 Atl. 383, 384; 9 L. R. A. 689, 693; 49 Am. St. Rep. 582 (1890), where an agreement between two rival and competing railroad companies, having the purpose and effect of destroying and preventing competition, was sustained as valid, it not appearing that the purpose or effect was to raise the prices of transportation above a reasonable standard, or that the public were prejudiced by their operation in any manner. The court said: "The naked question presented then is, whether all contracts between rival railway corporations which prevent competition, are necessarily contrary to public policy, and therefore *mala prohibita* and illegal in themselves. To state this question is to answer it in the negative, because it is obvious that the answer depends upon circumstances. While without doubt contracts which have a direct tendency to prevent a healthy competition, are detrimental to the public, and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities, at fixed and reasonable rates, they are beneficial and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained, that the public is benefited by unrestricted competition between rail-

result) in the *substantial control of the supply* of a given com-

roads, has been so emphatically disproved by the results which have generally followed its adoption in practice, that the hope of any permanent relief from excessive rates, through the competition of a parallel or rival road, may, as a rule, be justly characterized as illusory and fallacious." Of the case at bar it was said (66 N. H. 129; 20 Atl. 385; 9 L. R. A. 694): "The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiffs could not reasonably hope successfully to compete with their more powerful rival. The alternatives presented, it may be safely assumed, were combination or ruinous competition." Of cases cited as showing the illegality of such a combination, it was said: "They are cases of contracts in restraint of mercantile business; or cases of contracts which attempt to derogate from the right of eminent domain inherent in the State; or cases where contracts between railroad companies were held contrary to public policy, because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy, because one of the parties agreed not to build, or to cease to operate, a road which they were chartered to build or operate; or cases where contracts between railroad companies have been held illegal merely on the ground that they were *ultra vires*."

The test was also applied in *Ives v. Smith*, 3 N. Y. Suppl. 645, 654;

affirmed in 8 Id. 46 (Supm. Ct., Gen. T., 1889), where was sustained an agreement thus characterized: "The Oregon Railway & Navigation Company and the Northern Pacific Company have each the right to build branches in a great and widely-extended territory, unsettled, remote and undeveloped. The main lines of each company penetrate territory naturally tributary to them. From each of these main lines, branches or extensions from time to time become necessary, as the progress and development of the country may require. Instead of engaging in a strife which may cripple both corporations and obstruct the development of all the country through which the lines are to pass, they agree that each shall open up for the public certain parts of the country through which their lines are authorized to be built; that each shall pursue a plan, harmonious and consistent with its own system, affording to the public means of communication and travel, the one north and the other south of a certain line; that each may go on developing its enterprise and providing for the public, within certain prescribed territory, without the constant necessity of anticipating or avoiding the effects of the action of the other. How does this course infringe a sound dictate of public policy? It rather tends to promote than to defeat the opening of new districts to travel and commerce. It does not deprive the public of an advantage, but tends to secure it by leaving each company to the work of development in a certain district, without the necessity of confining itself to counter-

modity (or of services of a given kind) within a given area.

acting or countervailing the efforts of one to occupy a certain locality to the exclusion of the other." See also as to the validity of traffic agreements among competing railroad corporations, 2 Morawetz on Corporations (2d Ed.), §§ 1130, 1131; Cleveland, Columbus, Cincinnati, etc., Ry. Co. v. Closser, 126 Ind. 348, 360; 26 N. E. 159, 163; 9 L. R. A. 754, 760; 22 Am. St. Rep. 593, 603 (1890).

The test seems to have been applied in *Trust Co. of Georgia v. State*, 109 Ga. 736; 35 S. E. 323; 48 L. R. A. 520 (1900), where, in denying the application of the attorney-general for an injunction against a combination among street railroad corporations alleged to produce an illegal restriction upon competition, it was said (109 Ga. 758; 35 S. E. 330; 48 L. R. A. 529): "We think the evidence fully sustains the conclusion that the consolidation of these two lines would probably lead to granting the public generally along their routes greater and less expensive facilities and conveniences of transportation." And there was here rejected the test applied by the court below (109 Ga. 760; 35 S. E. 331; 48 L. R. A. 530), that if the consolidation defeated competition at any point on any of the lines, "or tended to defeat such competition or lessen it," relief by injunction should be granted. See also *State v. Central of Georgia Ry. Co.*, 109 Ga. 716, 727, 728; 35 S. E. 37, 40, 41; 48 L. R. A. 351, 355, 356 (1900). In *Jones v. Clifford's Executor (Fell)*, 5 Fla. 510, 515 (1854), a combination among the three pilots of the harbor of Pensacola for an

equal sharing in the profits was sustained, as it seems, on evidence that the arrangement had worked well in practice.

In the following decisions, where, on the whole, the test applied has been that of extent, with the result of condemning the restrictions under consideration, there is observable an inclination to apply the test of reasonableness, though under the erroneous impression that the doctrine against restrictions upon competition is based on that against contracts in restraint of trade. *Pacific Factor Co. v. Adler*, 90 Cal. 110, 117; 27 Pac. 36, 37; 25 Am. St. Rep. 102, 106 (1891); *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171 (1875); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 185; 8 Am. Rep. 159, 164 (1871); *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 19 S. W. 274; 15 L. R. A. 598; 29 Am. St. Rep. 690 (1892); *Milwaukee Masons & Builders' Assoc. v. Niezerowski*, 95 Wis. 129; 70 N. W. 166; 37 L. R. A. 127; 60 Am. St. Rep. 97 (1897). In *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19, 26 (Supm. Ct. Fla., 1908), where the restriction was in the business of keeping a general store in a village (see § 173), the test was said to be "whether the agreement in full operation will be injurious to the public welfare," so that it was illegal "if injurious in any perceptible degree to any considerable portion of the public." For instances of statutes aimed at restrictions upon competition and interpreted as including reasonable as well as unreasonable restrictions, see cc. XIX, XX.

Particularly, however, in case of restriction upon competition in business of a public character,⁷¹ there has been manifest a strong disposition to apply what we here call *the test of reasonableness*. The proper answer to the further question what constitutes reasonableness may be that the restriction is reasonable and therefore not illegal if "the public is not injured" thereby.⁷² Obviously, however, so broad and general a test is incapable of very close application, each case that arises being left to "be decided upon its own merits and upon the particular circumstances developed."⁷² Unsatisfactory as this test may be, it would seem, on the whole, preferable to the test of extent. The English decisions, so far as they recognize at all the doctrine condemning restrictions upon competition, seem to apply the test of reasonableness, rather than that of extent.⁷³ Any restriction,

⁷¹ See § 132.

⁷² See § 132. As to test being "whether or not the public interests have been injuriously affected," see under Ga. (§ 207).

⁷³ In *Collins v. Locke*, 4 App. Cas. 674 (1879), an agreement among four individuals and firms carrying on the business of stevedores in the port of Melbourne, for parceling out the stevedoring business, and *preventing competition*, at least among themselves, "and it may be to keep up the price," was held not unlawful as in restraint of trade, *if carried into effect by proper means*. The question then was as to the means. However, the test of reasonableness or "propriety" was not applied to *the restriction itself*, the validity of which seems assumed, but to *the means*, the validity of which was determined by the rules applicable to contracts in restraint of trade. The decision strikingly shows how little foothold what we must regard as the American doctrine condemning restrictions upon competition arising from the acts of

mere individuals, has obtained in England. It was pointed out in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 285; 29 C. C. A. 141, 154; 46 L. R. A. 122, 132 (6th C., 1898), that it is at variance with many decisions in this country. In *Hoffman v. Brooks*, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cin., 1884), however, the court, while applying the test as one *common to contracts in restraint of trade*, and restrictions upon competition, carefully distinguished between the two, thus avoiding the error above indicated. Here it was said: "In the first class of cases the interests of the public and those of the party are, to a great extent, the same. Both forbid any restriction of his earning power without an equivalent, and this is the reason why only a partial restriction is permitted, and that only for a valuable consideration. In the second class of cases, the immediate interests of the public and those of the contracting parties, are in conflict. The former desire lower, the latter high-

legal according to the test of extent, would probably be held legal according to the test of reasonableness. But the application of the test of reasonableness has resulted in holding legal many restrictions that would have been held illegal under the test of extent. It does not seem necessary to refer for such test to the doctrine against contracts in restraint of trade, though it may be that a useful analogy is furnished by the circumstance of the application of such test to that doctrine.

§ 134. **Agreements in restriction upon competition.**—A restriction upon competition is commonly, but not necessarily, the result of an agreement between two or more persons. We say, not necessarily, because it is obvious that there is in the nature of things no reason why a restriction upon competition, amounting even to an absolute monopoly, should not result from the efforts of a single individual.⁷⁴ The precise legal *status* of an individual in this situation has not been clearly defined, save so far as it may be inferred from the doctrines declared with reference to corporations, the legal *status* of which we shall consider hereafter. But if the restriction results from the joint efforts of two or more individuals, it seems a necessary conclusion that it also results from some agreement between

er, prices. Any prevention of competition injures the public in this regard. But when competition becomes so great that those engaged in a business cannot carry it on without loss, the public becomes exposed to the same danger as in the first class. The law, therefore, applies an analogous rule. Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and so increasing prices. Just the extent to which this may be done, courts have been careful not to define, just as they have refused to set monuments along the

line between fairness and fraud."

⁷⁴ See, however, *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Grant (Ontario), 540 (1871), where, assuming the legality of the doctrine condemning the enhancing of prices, it was held that it did not apply to an agreement among manufacturers. The court said (p. 544): "The article was not to be purchased in the market, but was actually to be produced by the parties themselves, and this product they could not be compelled to part with, except on their own terms." The so-called anti-trust acts are not, however, ordinarily directed against acts resulting from the efforts of a single individual.

them, express or implied. At any rate, we shall for the present confine our attention to restrictions upon competition resulting from agreement. An agreement resulting in such a restriction seems governed by the rules applicable to agreements generally, as to form and construction.⁷⁵ Thus it "may be a verbal agree-

⁷⁵ Thus, the agreement held illegal as in restriction upon competition was in form a *lease*, in *Field Cordage Co. v. National Cordage Co.*, 6 Ohio Cir. Ct. 615 (1892); *Clancey v. Onondaga Salt Manuf. Co.*, 62 Barb. (N. Y.) 395 (1862); *Anderson v. Shawnee Compress Co.*, 17 Okla. 231; 87 Pac. 315; 15 L. R. A. N. S. 846 (1906); a *covenant* in a deed against the sale of liquor, in *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36; 42 N. W. 532; 4 L. R. A. 373; 13 Am. St. Rep. 420 (1889); *Burdell v. Grandi*, 152 Cal. 376; 92 Pac. 1022; 14 L. R. A. N. S. 909 (1907). So the agreement consisted of a by-law (or by-laws) or a rule (or rules) of an association, in *Sayre v. Louisville Union Benev. Assoc.*, 1 Duvall (Ky.), 143; 85 Am. Dec. 613 (1863); *More v. Bennett*, 140 Ill. 69; 29 N. E. 888; 15 L. R. A. 361; 33 Am. St. Rep. 216 (1892); *Urmston v. Whitelegg*, 63 L. T. R. N. S. 455 (1890); *Milwaukee Masons & Builders' Assoc. v. Niezerowski*, 95 Wis. 129; 70 N. W. 166; 37 L. R. A. 127; 60 Am. St. Rep. 97 (1897); *Bailey v. Master Plumbers*, 103 Tenn. 99; 52 N. W. 853; 46 L. R. A. 561 (1899). See *People ex rel. v. N. Y. Board of Underwriters*, 54 How. Pr. (N. Y.) 240 (Supm. Ct., Sp. T., 1875). So of articles of voluntary association. *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880). So of regulations of "exchange" composed of dealers. *People v. Sheldon*, 139 N. Y. 251; 34 N. E. 785; 23 L. R. A.

221; 36 Am. St. Rep. 690 (1893); *Drake v. Siebold*, 81 Hun, 178; 30 N. Y. Suppl. 697 (1894). So of the constitution and by-laws of an association of dealers. *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252 (C. C. Cal., 1898). For an application of the rule allowing a resort to the surrounding circumstances, for the purpose of construing an agreement in writing, see *People v. North River Sugar Refining Co.*, 54 Hun, 354, 377; 7 N. Y. Suppl. 406, 410; 5 L. R. A. 386, 389 (1889). In *U. S. v. Hopkins*, 82 Fed. 529 (C. C. Kan., 1897), the monopoly condemned resulted mainly from the enforcement of a "rule of an exchange" composed of persons engaged in the live-stock commission business. Such rule prohibited any member from dealing with any person violating any of the rules or regulations of the exchange, or an expelled or suspended member, after notice of such suspension had been issued by the secretary or board of directors. The court, in determining the question of the existence of an illegal monopoly, considered not only "what appeared upon the face of its (the exchange's) preamble, rules and by-laws," but "the entire situation and the practical working and results of the defendants' methods of doing business." It appeared that the enforcement of such rule operated as a "boycott," to drive out of business all independent dealers. In *Detroit Salt Co. v. National Salt Co.*,

ment or understanding or a scheme not embodied in writing, but evidenced by the action of the parties." ⁷⁶ So far as the na-

134 Mich. 103, 120; 96 N. W. 1, 7 (1903), in a proceeding to enforce a written contract concededly not illegal on its face, it was held "proper to show the circumstances attending the making of the contract, the object and purpose in view and the construction placed upon it by the parties as evidenced by their dealings under it." In *Field Cordage Co. v. National Cordage Co.*, 6 Ohio Cir. Ct. 615 (1892), similar agreements with others engaged in the same business, were considered. Compare *Hartz v. Eddy*, 140 Mich. 479; 103 N. W. 852 (1905). See also as to reading different instruments together, *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. 790 (1893).

As to the relative functions of court and jury in determining the legality of an agreement, see *Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292; 59 N. E. 906 (1901), holding it error to leave it to the jury whether the agreement in suit "was entered into by the parties to it in good faith and without any intention to prevent competition or duly enhance or maintain the price of" the article in question.

In *Detroit Salt Co. v. National Salt Co.*, supra, while conceding that "when there is dispute and uncertainty as to the object, purpose, intent and knowledge of the parties to a contract not illegal upon its face, the question must go to the jury," held that it is otherwise "where all of the evidence is consistent only with an unlawful object and purpose on the part of all parties to the transaction." That a contract in restriction upon competition is to be strictly construed

as against a party complaining of violation, see *Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co.*, 72 Ill. 360 (1874). In *Standard Oil Co. v. Scofield*, 16 Abb. N. C. (N. Y.) 372 (Supm. Ct., Sp. T., 1885), the rule that all reasonable intendments are to be indulged in, in support of a pleading demurred to, was applied, sustaining the complaint in an action based on a contract claimed to be illegal as "in restraint of trade," i. e., as creating an unlawful restriction upon competition.

⁷⁶ *Harding v. American Glucose Co.*, 182 Ill. 551, 617; 55 N. E. 577, 599; 64 L. R. A. 738, 764; 74 Am. St. Rep. 189 (1899). See also *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 520; 56 S. E. 264, 269; 10 L. R. A. N. S. 268, 280; 116 Am. St. Rep. 901 (1907).

Harding v. American Glucose Co. was the case of each of several corporations conveying its property to a new corporation organized to conduct the same kind of business; this being done "with the knowledge and understanding that each of five other competing corporations was making the same kind of contract, and executing the same kind of conveyance in respect to their own respective properties, all to be consummated and delivered at the same time and under the direction and management of agents and promoters employed by all the corporations." See also *Chicago, Wilmington, etc., Coal Co. v. People*, 214 Ill. 421, 453; 73 N. E. 770, 780 (1905); *State v. Virginia-Carolina Chemical Co.*, 71 S. C. 544; 51 S. E. 455 (1905).

ture of things is concerned, there might be an infinite variety in such agreements, as to form. Nevertheless, the conditions of business have in practice reduced such agreements to a few generally recognized forms, prominently what are known as "pools" and "trusts."⁷⁷

§ 135. **Agreement in restriction upon competition, whether necessarily illegal.**—It has already been seen that a restriction upon competition is not necessarily illegal,⁷⁸ also that the existence of the element of combination in no way necessarily involves the existence of an illegal restriction upon competition.⁷⁹ It follows that there is nothing necessarily illegal in a mere agreement in restriction upon competition, whatever be its form.

§ 136. **Trusts.**—In its original signification the term "trust" simply involves the idea of one person holding property, not for his own benefit, but for that of another, called the beneficiary. But the special application of such term, now to be considered, is based on what was for a time a practice of parties to an agreement in restriction upon competition (commonly, but not necessarily, corporations or stockholders therein) surrendering the direct control of the management of the business covered by the agreement, to a central board of "trustees,"⁸⁰ the interest of

⁷⁷ As to restrictions resulting from acts of corporations, see c. XV.

⁷⁸ See § 118.

⁷⁹ See § 129.

⁸⁰ See Cook on Stock, Stockholders, etc., § 503a, quoted and applied in *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137, 185; 30 N. E. 279, 290; 15 L. R. A. 145, 159; 34 Am. St. Rep. 541, 553 (1892); also articles in 3 Pol. Sci. Quart. 592, 611 (1888) by T. W. Dwight, with a discussion of the "Sugar Trust" deed; 27 Am. Law Rev. 708 (1893) by U. M. Rose; 7 Harv. Law Rev. 157 (1893) by S. C. T. Dodd; 16 Id. 79 (1902-3) by R. L. Raymond; 3 Va. Law Reg. 163, 164 (1897-8) by W. L. Royall. In 1

Harv. Law Rev. 133 (1887), F. J. Stimson defines a trust as "a combination of property, real or personal, with powers of management or absolute disposal, or of stock in corporations, in the hands of a few persons," and says that "the origin of the word 'trust' seems to have been the well-known Standard Oil monopoly." The so-called "trust" agreements were all essentially similar in form. The following, under consideration and thus described in *Bishop v. American Preservers' Co.*, 157 Ill. 284, 311; 41 N. E. 765, 774; 48 Am. St. Rep. 317 (1895), is here presented by way of illustration: "The agreement recites that it is designed by its signers to form a trust for the purpose of se-

such parties being commonly represented by "trust certificates"

curing co-operation in the business of manufacturing preserves, etc., and of selling and dealing in the same in home and foreign markets." There were nine trustees, six designated by name and authorized to elect three others. "Such trustees are empowered to organize corporations with all or any of the powers specified in the purposes of the agreement; and the stock of such corporations is to be issued to or purchased by said trustees. For this stock the trustees are to issue certificates of trust. The agreement is to go into effect within sixty days from the time those holding the majority of the stock in seven specified corporations, formed or to be formed, shall transfer the same to the trustees. Each signer of the agreement agrees to assign and transfer to said trustees absolutely, all the shares which he may own in said corporations formed or to be formed, and is to receive therefor, not money, but trust certificates, equal to the appraised amount of the earning capacity of his stock, as fixed by the trustees and the stockholder. The trustees are authorized to purchase in the same way, by the issue of trust certificates, other stocks of the same companies, and also the property and business of any firm or individual engaged in the business of manufacturing and dealing in said products. The trustees are to exercise supervision over the corporations whose stocks are transferred to them, and are empowered to elect themselves directors and officers in such corporations, and procure such management of the same as will be conducive to the inter-

ests of the holders of the trust certificates. These trust certificates are divided into shares of the par value of \$100 each and are prepared by the trustees. They provide that the holders thereof shall be bound by the terms of the trust agreement, and of the by-laws passed in pursuance thereof, and are intended to show the interest of each beneficiary in the trust. The trustees hold the stocks transferred to them, in trust for the holders of the certificates, and are to receive and hold the dividends or interest upon said stocks, and are to distribute the same by declaring dividends upon the certificates. The stocks so transferred to the trustees are to be held by them for the benefit of all the owners of the trust certificates. The trust is to continue for twenty-five years, subject to the right of seventy-five per cent. of the holders of the certificates to terminate it after the expiration of one year, and of sixty-five and two-thirds per cent. of such holders to terminate it at the end of five years; and the trustees cannot sell or surrender any of the stocks held by them, during the continuance of the trust, without the consent of a majority in number and value of the holders of the trust certificates." See also descriptions of the agreements under consideration in *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448; 41 N. E. 188; 47 Am. St. Rep. 200 (1895); *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247, 266 (1899); *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 24 N. E. 834; 9 L. R. A. 33; 18 Am. St. Rep. 843 (1890); *State ex rel. v.*

received in lieu of stock in the corporations.⁸¹ Trusts in this form, however, have come to be mainly of historic interest merely, for the legal difficulties experienced in their organization and conduct have led to their disuse, and combined action to restrict competition is now commonly through the medium of corporate organization. But the term "trust" continues in common use, being applied without much discrimination to any business conducted on a large scale, particularly if conducted by a corporation.⁸² Thus it is defined as "a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto, and to the injury of the

Standard Oil Co., 49 Ohio St. 137; 30 N. E. 279; 15 L. R. A. 145; 34 Am. St. Rep. 541 (1892); Gould v. Head, 38 Fed. 886 (C. C. Colo., 1889); Same v. Same, 41 Id. 240 (C. C. Colo., 1890); and see Spelling on Trusts and Monopolies, c. 12. What are known as "car trusts" resemble in name only the trusts now under consideration. See, generally, Ray on Contractual Limitations, p. 248. There are in some instances statutory prohibitions especially directed against this now disused form of organization. See under the anti-trust acts, c. XX.

⁸¹ In *State v. American Cotton Oil Trust*, 40 La. Ann. 8; 3 So. 409 (1888), an injunction was refused against dealing in the shares of the American Cotton Oil Trust, the court saying: "If these certificates have been taken as the price or in exchange for \$10,000,000 of property transferred to the trust, then, whatever be their validity and effect as shares of stock, whether or not they confer on the holders the privileges of corporate stock-

holders, and whether or not they confer any right to participate in the carrying on of any illegal business, yet they undoubtedly do represent an interest in the property referred to, and as such have a legal and real value, and we cannot understand how such property rights can be placed *hors de commerce* by an injunction." See also, as to the rights of a transferee of a Standard Oil Trust certificate, *Rice v. Rockefeller*, 134 N. Y. 174; 31 N. E. 907; 17 L. R. A. 237; 30 Am. St. Rep. 658 (1892).

⁸² In *Harding v. American Glucose Co.*, 182 Ill. 551, 615; 55 N. E. 577, 598; 64 L. R. A. 738, 763; 74 Am. St. Rep. 189 (1899), it was said: "It makes no difference whether the combination is effected through the instrumentality of trustees and trust certificates or whether it is effected by creating a new corporation and conveying to it all the property of the competing corporations." See generally, as to restrictions upon competition, as resulting from acts of corporations, c. XV.

public, and which tends to create a monopoly.⁸³ So as "any form of combination between corporations, or corporations and natural persons, for the purpose of regulating production and repressing competition by means of the power thus centralized."⁸⁴ There may be a tendency to limit the application of the term to so-called "industrial," as distinguished from railroad or other corporations of a public character, restrictions resulting from agreements among corporations of the latter class being designated as pools.⁸⁵ This distinction is not, however, very rigidly applied.

§ 137. **Pools.**—Reference has just been made to what may be a tendency to designate as pools rather than trusts, restrictions resulting from agreements in restriction upon competition among railroad or other corporations of a public character, as distinguished from so-called industrial corporations.⁸⁶ The dis-

⁸³ State ex inf. *Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 43; 52 S. W. 595, 607; 45 L. R. A. 363, 376 (1899). See *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 520; 56 S. E. 264, 269; 10 L. R. A. N. S. 268, 280; 116 Am. St. Rep. 901 (1907).

⁸⁴ *MacGinniss v. Boston, etc., Consolidated Copper & Mining Co.*, 29 Mont. 428, 454; 75 Pac. 89, 95 (1904). In *People ex rel. v. American Tobacco Co.*, 2 Chicago L. J. Weekly, 249 (Cook Co. Cir. Ct., 1897?), a "commercial trust" was defined as "a combination of persons, copartnerships or corporations engaged in similar industries, for the purpose of uniting their respective interests under one governing body, invested with the power to limit the production, dictate the sales, and regulate the prices of the articles produced by its agents and members, thereby tending to destroy competition." See also *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 112 (1904).

The illegality of so-called "voting trusts" is ordinarily based on a different ground from those considered in this treatise. As to such, see *Cook on Corporations*, 6th ed., § 622.

⁸⁵ It is said in *Spelling on Trusts and Monopolies*, § 109, that "the latter-day 'trust' is but an adaptation of the railroad pool to manufacturing and trading corporations." As to pools, see § 137.

⁸⁶ In *American Biscuit & Manuf. Co. v. Klotz*, 44 Fed. 721 (C. C. La., 1891), "pooling" was defined as "an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits," and it was said that the expression in the Federal anti-trust act, "combination in the form of trust," "would seem to point to just what in popular language is meant by pooling." Compare *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 112 (1904). By § 5 of the Interstate Commerce Act of 1887, it is for-

inction between a pool and a trust is one of form rather than of substance, though it may be that the term pool as ordinarily used has special reference to the element of distribution of profits. Apart from the element of illegality, there seems to be no difference in kind between a pool and an ordinary partnership.

§ 138. **Agreements for future delivery.**—There is no necessary connection between the question of the legality of agreements for future delivery, and that of the legality of restrictions upon competition. But agreements for future delivery being, as

bidden to "any common carrier subject to the provisions of this act, to enter into any contract, agreement or combination with any other common carrier or carriers, for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." See as to pooling contracts at common law and under this provision, *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. 58; 7 C. C. A. 15; 24 L. R. A. 73 (8th C., 1893); *Re Pooling Freights*, 115 Fed. 588 (D. C. Tenn., 1902). In *Interstate Commerce Commission v. Southern Pacific Co.*, 132 Fed. 829, 846 (C. C. Cal., 1904), "any contract, agreement or combination between different and competing railroads, whereby the volume or quantity of freights each or any shall receive for transportation, is to be determined by or through any conventional means or agency which was intended to and does suppress competition, either in rate or service or competition directly addressed to shippers" was held to be "a traffic pool," within the meaning of § 5. But see reversal in *Southern Pacific Co. v. Interstate Commerce Commission*, 200 U. S. 536, 557; 26 Supm. 330, 336; 50 L. Ed. 585

(1906). In *Tift v. Southern Ry. Co.*, 138 Fed. 753, 761 (C. C. Ga., 1905), where relief was allowed under § 5 against excessive rates resulting from concert of action among railroad carriers, it was said: "Pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them afterwards." A pooling agreement among such carriers, entered into prior to such act, was condemned in *Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co.*, 61 Fed. 993; 9 C. C. A. 659 (8th C., 1894). The court said: "The contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates; for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates." See note on "Syndicates and Pools" in 16 Abb. N. C. 380; article in 16 Harv. Law Rev. 79 (1902-3) by R. L. Raymond.

will presently be seen, so closely incident to corners,⁸⁷ it becomes desirable, for the purpose of clearness of comprehension at least, to consider the question of their legality. What appears to be the generally accepted doctrine has been thus stated: "A contract for the sale of goods to be delivered at a future day is valid, even though the seller has not got the goods, nor any other means of getting them than to go into the market and buy them;⁸⁸ but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if under guise of such a contract the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager and is null and void."⁸⁹ To make such agreement illegal it must appear that not merely one, but both parties, did not contemplate a delivery, but merely a settlement of differences.⁹⁰ Agreements for future delivery have taken a great variety of forms, such as what are commonly known as "options," "puts," "calls," etc.⁹¹ The question of the legality of such an agreement is ordinarily one of fact depending on the circumstances of the case.⁹² Of course, in case of the price contracted for being the lower, the damages are payable by the party contracting to sell, and in case of it being the higher, by the party contracting to buy.

§ 139. **Corners.**—A corner is simply a specific form of an agreement in restriction upon competition. The parties to

⁸⁷ See § 139.

⁸⁸ See Dewey on Contracts for Future Delivery, p. 26; 14 Am. & Eng. Enc. of Law, 2d ed., p. 607.

⁸⁹ *Irwin v. Williar*, 110 U. S. 499, 508; 4 Supm. 160, 165; 28 L. Ed. 225 (1884). For numerous illustrations of such agreements held illegal, see Dewey on Contracts for Future Delivery; 14 Am. & Eng. Enc. of Law 2d ed., p. 610. In

many States statutes have been enacted in prohibition of such agreements.

⁹⁰ See Dewey on Contracts for Future Delivery, p. 50; 14 Am. & Eng. Enc. of Law, 2d ed., p. 611.

⁹¹ See Dewey on Contracts for Future Delivery, p. 27; 14 Am. & Eng. Enc. of Law, 2d ed., p. 605.

⁹² See decisions, *supra*.

such an agreement, which is commonly on an extensive sale, instead of relying on the normal demand for the commodity in question, endeavor to create an artificial demand by means of entering into agreements for future delivery to themselves. Their success depends on those that have agreed to deliver to them becoming unable to procure the commodity for that purpose, by reason of the supply thereof being under the control of the very persons to whom they have contracted to deliver.⁹³ Such inability to deliver makes them liable for damages. It would seem clear on principle that the legality of a corner is to be determined by the tests already stated, though many decisions have proceeded on the assumption that, for the purpose of such determination the question of the legality of the agreements for future delivery is material. As has been said with reference to the distinction between a pool and a trust, the

⁹³ The transactions condemned as "cornering," in *Samuels v. Oliver*, 130 Ill. 73; 22 N. E. 499 (1889), consisted of buying all the market supply of an article of staple necessity, and entering into contracts for the delivery of a larger amount than could, in the state of the market supply, be delivered. Here it was testified by the president of the Chicago Merchants' Exchange (130 Ill. 84; 22 N. E. 502): "By 'cornering the market,' I mean when parties have contracts on hand for a greater amount than the sellers have cash grain to deliver." In *Wright v. Cudahy*, 168 Ill. 86; 48 N. E. 39 (1897), a contract was held illegal, as in violation of § 130 of the Criminal Code, making it a crime to "forestall the market by spreading false rumors, to influence the price of commodities therein, or corner the market, or attempt to do so." In the testimony a corner was defined as "where somebody succeeds in buying for future delivery more property of a given kind, than

is possible for the seller to deliver before the day of the maturity of the contract." Similarly a corner in wheat was condemned as illegal in *Raymond v. Leavitt*, 46 Mich. 447; 41 Am. Rep. 170 (1881). So a corner in oats, *Ex parte Young*, 6 Bissell, 53; Fed. Cas. No. 18145 (1874); *Bank of Montreal v. Waite*, 105 Ill. App. 373 (1903). See further as to corners, *Wright v. Crabbs*, 78 Ind. 487 (1881; wheat); *Kirkpatrick v. Bonsall*, 72 Pa. St. 155 (1872); *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327 (1869; railroad stock); *Foss v. Cummings*, 149 Ill. 353; 36 N. E. 553 (1894; corn); *Wells v. McGeoch*, 71 Wis. 196; 35 N. W. 769 (1888); *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906).

That the legality of a corner does not depend on what may have been the common law doctrine with reference to the legality of forestalling or engrossing, see § 123.

distinction between a corner and a pool or a trust is one of form rather than of substance. As the term *pool* may have special reference to the element of distribution of profits, so it may be that the term *corner* has special reference to the element of raising price.

§ 140. **Agreements for exclusive service, dealing or agency.**—

An agreement for exclusive service, dealing or agency obviously involves the existence of a monopoly as to the particular service, dealing or agency, yet the legality of such an agreement seems never to have been seriously questioned.⁹⁴ But an agreement

⁹⁴ In *Ellerman v. Chicago Junction Railways, etc., Co.*, 49 N. J. Eq. 217, 252; 23 Atl. 287, 299 (1891), an agreement between proprietors of stockyards and their principal patrons, whereby the latter were to deal with the former exclusively, and not engage in the same business, was sustained. The court said: "The non-competition was but an incident subsequent to the affirmative agreement to remain the customers and patrons of the transit company, but if the purpose of the agreement had been the prevention of competition, such a purpose would have been lawful." So in *State ex rel. v. St. Paul Gaslight Co.*, 92 Minn. 467; 100 N. W. 216 (1904), of an agreement by a gas-light company to dispose of its entire output of coke, a residual product of gas manufactured by it, to a coal company, which, however, was not a competitor of the gas company. In *Matthews v. Associated Press of N. Y.*, 136 N. Y. 333; 32 N. E. 981; 32 Am. St. Rep. 741 (1893), was sustained a by-law of an association of members of the press forbidding any member to "receive or publish the regular news dispatches of any other news association covering a like territory and

organized for a like purpose." So in *Woods v. Hart*, 50 Neb. 497, 504; 70 N. W. 53, 55 (1897), of an agreement for an exclusive agency for the sale of real estate, the appointment as agent not being for a fixed or definite period. So agreements for an exclusive agency were sustained in *N. Y. Trap Rock Co. v. Brown*, 61 N. J. Law, 536; 43 Atl. 100 (1898); *Locker v. American Tobacco Co.*, 121 App. D. 443; 106 N. Y. Suppl. 115 (1907). See also as to such agreements, under Ill. (§ 209); Miss. (§ 219); Tex. (§ 232). As to exclusive agency for sale of agricultural products, see *Tenn. L.* 1907, c. 155.

Agreements for exclusive trade were sustained in *Catt v. Tourle*, 38 L. J. Ch. 665 (1869); *Keith v. Herschberg Optical Co.*, 48 Ark. 138; 2 S. W. 777 (1887); *Schwalm v. Holmes*, 49 Cal. 665 (1875); *Brown v. Rounsavell*, 78 Ill. 589 (1875); *Ferris v. American Brewing Co.*, 155 Ind. 539; 58 N. E. 701; 52 L. R. A. 305 (1900); *Palmer v. Stebbins*, 3 Pick. (Mass.) 188; 15 Am. Dec. 204 (1825); *Live-stock Assoc. of N. Y. v. Levy*, 54 N. Y. Super. 32 (1886); *Godard v. American Queen*, 27 Misc. 482; 59 N. Y. Suppl. 46 (Supm.

for exclusive trade, though legal, considered by itself, may yet

Ct., Sp. T., 1899); *Blauner v. Williams Co.*, 36 Misc. 173; 73 N. Y. Suppl. 165 (Supm. Ct., App. T., 1901); *Bald Eagle Valley R. R. Co. v. Nittany Valley R. R. Co.*, 171 Pa. St. 284; 33 Atl. 239; 29 L. R. A. 423; 50 Am. St. Rep. 807 (1895); *George v. East Tennessee Coal Co.*, 15 Lea (Tenn.), 455; 54 Am. Rep. 425 (1885); *Clark v. Crosby*, 37 Vt. 188 (1864). See *Heimbuecher v. Goff*, 119 Ill. App. 373 (1905); *Over v. Byram Foundry Co.* 37 Ind. App. 452; 77 N. E. 302; 117 Am. St. Rep. 327 (1906); *Giles v. Dunbar*, 181 Mass. 22; 62 N. E. 985 (1902). See under Tex. (§ 232). As to effect of S. C. Civil Code (1902), § 2845, see *Packard v. Byrd*, 73 S. C. 1; 51 S. E. 678; 6 L. R. A. N. S. 547 (1905); *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.*, 75 S. C. 378; 55 S. E. 973; 9 L. R. A. N. S. 501 (1905).

Agreements for exclusive employment were sustained in *Pilkington v. Scott*, 15 M. & W. 657 (1846); *Hartley v. Cummings*, 5 C. B. 247 (1847); *Carnig v. Carr*, 167 Mass. 544; 46 N. E. 117; 35 L. R. A. 512; 57 Am. St. Rep. 488 (1897); *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 304; 53 C. C. A. 484; 58 L. R. A. 915 (7th C., 1902). See *Kessler v. Chapelle*, 73 App. D. 447; 77 N. Y. Suppl. 285 (1902). Compare *Morris v. Colman*, 18 Vesey, 437 (1812; sustaining agreement with theater proprietors not to write dramatic pieces for any other theater). So even of an agreement to serve for life. *Wallis v. Day*, 2 M. & W. 273 (1837). By Mass. R. L. (1902), c. 56, § 1; so by Kan. L. 1907, c. 139,

it is prohibited under a penalty to "make it a condition of the sale of goods, wares or merchandise, that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person," etc. But this does "not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of goods, wares or merchandise." In *Commonwealth v. Strauss*, 188 Mass. 229; 74 N. E. 308 (1905), such prohibition was held not to include offering inducement by way of discount from regular price, to sell seller's goods exclusively. See subsequent decision in 191 Mass. 545; 78 N. E. 136; 11 L. R. A. N. S. 968 (1906), as to what is "exclusive sale." The statute was here sustained against various constitutional objections; and see as to its effect in preventing creation of monopoly. See also L. 1907, c. 469.

In *Central N. Y. Telephone, etc., Co. v. Averill*, 105 N. Y. Suppl. 378 (Supm. Ct., Sp. T., 1907), was held invalid a provision in a contract for telephone service in a hotel, that the corporation furnishing such service should have the exclusive right to place telephones in the hotel. This conclusion was based on a distinction between business of a private and that of a public character. See § 132. Such application of the distinction seems to us of doubtful validity, the restriction not being upon the one engaged in the business of a public character, but upon one other party to the contract. Relief against such provision was denied in subsequent decision in 129 App. D. 752; 114 N. Y. Suppl. 99 (1909).

be illegal as a part of a scheme illegal as in restriction upon competition.⁹⁵

§ 141. **Grant by carrier of exclusive privilege.**—Owing, it would seem, to a failure to distinguish between the duty of a carrier to the general public, and the right of the carrier to select the instrumentalities to be employed in serving the public, such right of selection has in certain cases been denied.⁹⁶ But the exercise of such right of selection is a mere incident of the general power of transportation, and is no more open to objection as a monopoly than is the lease or grant of specific property, as the exercise of a power incident to the ownership of such property. Thus it has been said: "There is hardly more objection on the ground of public policy to such a restriction upon a railway company in cases like these, than there would be to a restriction upon a lessor not to allow the subject-matter of the lease to be enjoyed by any one but the lessee during the lease. The privilege, when granted, is hardly capable of other than exclusive enjoyment."⁹⁷

⁹⁵ See *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401; 58 N. E. 525; 52 L. R. A. 262; 79 Am. St. Rep. 655 (1900); *Locker v. American Tobacco Co.*, 121 App. D. 443; 106 N. Y. Suppl. 115 (1907). This principle seems to have been overlooked in the cases involving the legality of the methods of the "Dis-tilling & Cattle Feeding Company"; see on this point, § 199. Compare under Federal act (see § 194), *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454; 60 C. C. A. 290; 64 L. R. A. 689 (8th C., 1903); see also under Ohio (§ 227). For prohibition against arrangements for dealing in particular article, etc., without dealing in "any competing article," see under Mo. (§ 220).

⁹⁶ See following sections.

⁹⁷ *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 287; 29 C. C. A.

141, 157; 46 L. R. A. 122, 134 (6th C., 1898); affirmed in 175 U. S. 211; 20 Supm. 96; 44 L. Ed. 136 (1899). In *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 646; 34 S. E. 372, 376; 46 L. R. A. 431, 435 (1899), was clearly stated "the distinction which exists between the duty which a railroad company owes to the public and the private right to regulate and control its property." See also *Fluker v. Georgia R. R. & Banking Co.*, 81 Ga. 461; 8 S. E. 529; 2 L. R. A. 843; 12 Am. St. Rep. 328 (1888); *Donovan v. Pennsylvania Co.*, 120 Fed. 215; 57 C. C. A. 362; 61 L. R. A. 140 (7th C., 1903); see subsequent decision in 199 U. S. 279; 26 Supm. 91; 50 L. Ed. 192 (1905).

See, on the general subject, article in 20 Harv. Law Rev. 253, 345, 428 (1907) by Jeremiah Smith.

§ 142. **Grant of exclusive privilege of soliciting patronage of passengers.**—The failure to distinguish between the duty of a carrier to the general public and the right of the carrier to select the instrumentalities to be employed in serving the public, has been conspicuously illustrated in decisions denying the right to grant to a hack proprietor, for instance, the exclusive privilege of soliciting patronage of passengers on the grounds of the carrier, particularly at a railroad station. Such decisions seem, however, clearly against the weight of authority.⁹⁸ And it has

⁹⁸ The grant of such a privilege was held void in *Indianapolis Union Ry. Co. v. Dohn*, 153 Ind. 10; 53 N. E. 937; 45 L. R. A. 427; 74 Am. St. Rep. 274 (1899); *McConnell v. Pedigo*, 92 Ky. 465; 18 S. W. 15 (1892); *Palmer Transfer Co. v. Anderson*, 115 S. W. 182 (Ct. App. Ky., 1909); *Kalamazoo Hack & Bus Co. v. Sootsma*, 84 Mich. 194; 47 N. W. 667; 10 L. R. A. 819; 22 Am. St. Rep. 693 (1890); *Montana Union Ry. Co. v. Langlois*, 9 Mont. 419; 24 Pac. 209; 8 L. R. A. 753; 18 Am. St. Rep. 745 (1890). So in *Cravens v. Rodgers*, 101 Mo. 247; 14 S. W. 106 (1890), under constitutional prohibition against "discrimination in charges or facilities in transportation . . . between transportation companies and individuals, or in favor of either." See also *Hedding v. Gallagher*, *infra*. As to injunction as remedy against discrimination by carrier against hackman, see *Cooper v. De Vall*, 81 Ark. 314; 98 S. W. 976; 8 L. R. A. N. S. 1027 (1906).

But such a grant was sustained in *Donovan v. Pennsylvania Co.*, 120 Fed. 215; 57 C. C. A. 362; 61 L. R. A. 140 (7th C., 1903); 199 U. S. 279; 26 Supm. 91; 50 L. Ed. 192 (1905); *Union Depot & Ry. Co. v. Meeking*, 42 Colo. 89; 94 Pac. 16

(1908); *N. Y., New Haven & Hartford R. R. Co. v. Scovill*, 71 Conn. 136; 41 Atl. 246; 42 L. R. A. 157; 71 Am. St. Rep. 159 (1898); *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636; 34 S. E. 372; 46 L. R. A. 431 (1899); *Hart v. Atlanta Terminal Co.*, 128 Ga. 754; 58 S. E. 452 (1907); *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35; 17 N. E. 89; 9 Am. St. Rep. 661 (1888); *Boston & Albany R. R. Co. v. Brown*, 177 Mass. 65; 58 N. E. 189; 52 L. R. A. 418 (1900); *Boston & Maine R. R. Co. v. Sullivan*, 177 Mass. 230; 58 N. E. 689; 83 Am. St. Rep. 275 (1900); *Hedding v. Gallagher*, 72 N. H. 377; 57 Atl. 225; 64 L. R. A. 811 (1903); overruling, it seems, previous decision in 69 N. H. 650; 45 Atl. 96; 76 Am. St. Rep. 204 (1899); *Brown v. N. Y. Central, etc., R. R. Co.*, 75 Hun, 355; 27 N. Y. Suppl. 69 (1894); *N. Y. Central, etc., R. R. Co. v. Warren*, 31 Misc. 571; 64 N. Y. Suppl. 781 (Supm. Ct., Sp. T., 1900); *State ex rel. v. Union Depot Co.*, 71 Ohio St. 379; 73 N. E. 633; 68 L. R. A. 792 (1905); *Snyder v. Union Depot Co.*, 19 Ohio Cir. Ct. R. 368 (Franklin C. C., 1899); *Oregon Short Line R. Co. v. Davidson*, 33 Utah, 370; 94 Pac. 10; 16 L. R. A. N. S. 777 (1908). So

been said:⁹⁹ "We find that the courts have gone no further than to prevent discrimination in granting privileges at the point where the contractual relations between the company and the passengers cease; that is, at the station yard or platform where passengers enter and leave the premises. No case has been brought to our attention where an attempt has been made to apply the rule within a depot, where the general business is transacted between a common carrier and its patrons."

§ 143. **Grant of exclusive privilege to connecting carrier.**—The failure to distinguish, just alluded to, is also illustrated in decisions denying the right of a carrier to select the means of transportation as between connecting carriers.¹

in *Norfolk & Western Ry. Co. v. Old Dominion Baggage Co.*, 99 Va. 111; 37 S. E. 784; 50 L. R. A. 722 (1901), notwithstanding prohibition taken from English statute against carrier giving "undue preference." See English decisions to the same effect here cited.

And so of grant of privilege of soliciting transfer business on train. *Lewis v. Weatherford, etc., Ry. Co.*, 36 Tex. Civ. App. 48; 81 S. W. 111 (1904; so held notwithstanding prohibition of anti-trust act; see § 232).

As to N. Y. statute (L. 1890, c. 565) forbidding preferences by railroad company as between carriers transacting business on its premises, see *N. Y. Central, etc., R. R. Co. v. Flynn*, 74 Hun, 124; 26 N. Y. Suppl. 859 (1893); *N. Y. Central, etc., R. R. Co. v. Sheeley*, 27 N. Y. Suppl. 185 (Supm. Ct., Sp. T., 1893); *N. Y. Central, etc., R. R. Co. v. Warren*, *supra*.

Municipal ordinances prohibiting the soliciting of the patronage of passengers on railroad premises were sustained in *City of Seattle v. Hurst*, 50 Wash. 424; 97 Pac. 454 (1908); *Moerder v. City of Fre-*

mont, 19 Ohio Cir. Ct. 394 (1899). See *Commonwealth v. Matthews*, 122 Mass. 60 (1877); *City of St. Paul v. Smith*, 27 Minn. 364; 38 Am. Rep. 296 (1880). Compare as to validity of ordinance providing for establishment of hack stands in proximity to railroad premises, *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289; 54 N. E. 825; 53 L. R. A. 223 (1899).

In *N. Y., N. H., etc., R. R. Co. v. Bork*, 23 R. I. 218; 49 Atl. 965 (1901), where an action of trespass for remaining and soliciting traffic as a hackman at a railroad station was held to lie, the validity of the grant to another of the exclusive right to solicit traffic at such station was held not involved.

⁹⁹ *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188; 81 N. W. 835; 47 L. R. A. 532 (1900), where a grant of the exclusive privilege of soliciting the patronage of passengers within a depot building and train sheds attached, was sustained.

See, on the general subject, article in 20 *Harv. Law Rev.* 253, 345, 428 (1907) by Jeremiah Smith.

¹ Thus of privilege to connecting steamboat company. *Indian River*

§ 144. **Grant by carrier of exclusive privilege of transportation.**—Closely analogous to the decisions just considered are those denying the right of a carrier to select an agency for the purpose of exclusive transportation over its own line; thus an express company for the purpose of exclusively transporting express matter.² Such decisions seem, however, against the weight of authority.³

Steamboat Co. v. East Coast Transp. Co., 28 Fla. 387; 10 So. 480; 29 Am. St. Rep. 258 (1891). See also as to discrimination between connecting railroads, *Prescott & Arizona Central R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co.*, 73 Fed. 438 (C. C. N. Y., 1896); *Post v. Railroad*, 103 Tenn. 184; 52 S. W. 301; 55 L. R. A. 481 (1899). See under Federal act, § 182. In *Alexandria Bay Steamboat Co. v. N. Y. Central, etc.*, R. R. Co., 18 App. D. 527; 45 N. Y. Suppl. 1091 (1897), an arrangement by a railroad company with one of two competing steamboat companies connecting with it at its terminus, by which one of such companies was given the advantage over the other in transportation, was sustained as legal, notwithstanding the prohibition of L. 1890, c. 564; L. 1892, c. 688, against combinations of corporations to prevent competition. So in *Wiggins Ferry Co. v. Chicago & Alton R. R. Co.*, 73 Mo. 389, 410; 39 Am. Rep. 519, 523 (1881), was sustained an agreement by a railroad company to employ but one ferry at a given point. See as to agreement giving elevator exclusive right to handle grain transported over railroad, *Richmond v. Dubuque & Sioux City R. R. Co.*, 26 Iowa, 191, 201 (1868).

² *Sandford v. Railroad Co.*, 24 Pa. St. 378; 64 Am. Dec. 667

(1855); *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188, 196 (1869).

³ In the *Express Cases*, 117 U. S. 1; 6 Supm. 542; 29 L. Ed. 791 (1886), where railroad companies were held not bound to furnish independent express companies with equal facilities for doing an express business on their passenger trains, the court said (117 U. S. 24; 6 Supm. 554): "The public require the carriage, but the company may choose its own appropriate means of carriage." The doctrine of the *Express Cases* on this point was applied in *Blank v. Illinois Central R. R. Co.*, 80 Ill. App. 475, 483 (1899); *Louisville, New Albany, etc., Ry. Co. v. Keefer*, 146 Ind. 21; 26; 44 N. E. 796, 798; 38 L. R. A. 93, 94; 58 Am. St. Rep. 348 (1896); *Dulaney v. United Rys. & Electric Co.*, 104 Md. 423; 65 Atl. 45 (1906). As to application of Texas anti-trust act, see § 232.

As to agreements with stock yard companies, see *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128; 11 Supm. 461; 35 L. Ed. 73 (1891); *Butchers & Drovers' Stock-yards Co. v. Louisville & N. R. R. Co.*, 67 Fed. 35; 14 C. C. A. 290 (6th C., 1895); with sleeping-car companies, *Chicago, St. Louis, etc., R. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79; 11 Supm. 490; 35 L. Ed. 97 (1891); *Fort Worth & Denver*

§ 145. **Discrimination by carrier as between members of general public.**—A discrimination by a carrier as between members of the general public seeking accommodations,⁴ stands on a different ground from a grant of an exclusive privilege by way of selection of the instrumentality to be employed in serving the public. A reason for condemning such discrimination as between members of the general public has been found in their tendency to build up monopolies.⁵ The general subject of such discriminations is, however, outside the scope of this treatise.

§ 146. **Grant of right to establish line of telegraphic communication along right of way of railroad.**—Another class of cases

City Ry. Co. v. State, 99 Tex. 34; 87 S. W. 336; 70 L. R. A. 950 (1905; see under Tex., § 232).

⁴ See, for instance, as to such, *Hays v. Pennsylvania Co.*, 12 Fed. 309 (C. C. Ohio, 1882); *Burlington, C. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 652 (C. C. Minn., 1887); *Kinsley v. Buffalo, N. Y. & P. R. R. Co.*, 37 Fed. 181 (C. C. Pa., 1888); *West Coast Naval Stores Co. v. Louisville & N. R. R. Co.*, 121 Fed. 645; 57 C. C. A. 671 (5th C., 1903); *Blair v. Sioux City & Pacific Ry. Co.*, 109 Iowa, 369; 80 N. W. 673 (1899); *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.*, 111 Ky. 960; 64 S. W. 969; 55 L. R. A. 601; 98 Am. St. Rep. 447 (1901); *State v. Southern Ry. Co.*, 125 N. C. 666; 34 S. E. 527 (1899); *Scofield v. Railway Co.*, 43 Ohio St. 571, 600; 3 N. E. 907, 918; 54 Am. Rep. 846, 853 (1885); *Baltimore & Ohio R. R. Co. v. Diamond Coal Co.*, 61 Ohio St. 242; 55 N. E. 616 (1899); *Memphis News Pub. Co. v. Southern Ry. Co.*, 110 Tenn. 684; 75 S. W. 941; 63 L. R. A. 150 (1903); *Hill v. St. Louis Southwestern Ry. Co.*, 75 S. W. 874 (Tex. Civ. App. 1903); *Northwestern Warehouse Co.*

v. Oregon Ry., etc., Co., 32 Wash. 218; 73 Pac. 388 (1903).

In nearly all the States (and see § 2 of the Interstate Commerce Act) there are express constitutional or statutory prohibitions against discrimination by railroad or other carriers; in some instances against discrimination by others engaged in business of a public character, such as that of transmitting messages by telegraph or telephone.

As to discrimination by industrial combinations generally; e. g., one controlling the manufacture of paper, see 2 Eddy on Combinations, § 1055.

⁵ This was conspicuously the case in *Scofield v. Railway Co.*, *supra*, a case of discrimination in favor of the Standard Oil Company; and see *Messenger v. Pennsylvania R. R. Co.*, 37 N. J. Law, 531, 535; 18 Am. Rep. 754, 757 (1874); *Louisville, Evansville, etc., R. R. Co. v. Wilson*, 132 Ind. 517; 32 N. E. 311; 18 L. R. A. 105 (1892).

As to effect of exclusive arrangements by means of rebates and other devices for less than lawful rates of transportation, as an element of illegal combinations under Federal anti-trust act, see *Swift v.*

sometimes erroneously placed under the definition of monopolies is that of grants by railroad corporations of the exclusive right of establishing lines of telegraphic communication along their right of way.⁶ Assuming the railroad corporation to otherwise have the power to make such a grant, the objection that it creates a monopoly would seem to be equally applicable to, for instance, a lease of its road that otherwise it has power to make. The real question in such a case is whether the grant was within the corporate powers.⁷

U. S., 196 U. S. 375, 401; 25 Supm. 276, 281; 49 L. Ed. 518 (1905).

⁶ Such grants were held void as monopolies in *Western Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160; 38 Am. Rep. 781 (1880); *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1 (C. C. Iowa, 1882); *Baltimore & Ohio Tel. Co. v. Western Union Tel. Co.*, 24 Fed. 319 (C. C. La., 1884). Compare *Western Union Tel. Co. v. Baltimore & Ohio Tel. Co.*, 23 Fed. 12 (C. C. Ind., 1885); *Georgia R. & Banking Co. v. Atlantic Postal Tel. Co.*, 152 Fed. 991 (C. C. Ga., 1907). See, however, *Western Union Tel. Co. v. Atlantic & Pacific Tel. Co.*, 7 Bissell, 367 (1877); *St. Louis & Cairo R. R. Co. v. Postal Tel. Co.*, 173 Ill. 508, 524; 51 N. E. 382, 387 (1898); *Mobile & Ohio R. R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731; 26 So. 370; 45 L. R. A. 223 (1899).

⁷ Indeed it would seem that the decisions (or at least that in 11 Fed. 1, *supra*) might have rested solely on the ground that the grants were in conflict with the act of Congress of July 24, 1866. See also, as to the prohibition contained in such act, *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; 24 L. Ed. 708 (1877); *Western*

Union Tel. Co. v. American Union Tel. Co., 9 Bissell, 72 (1879); *Western Union Tel. Co. v. Baltimore & Ohio Tel. Co.*, 19 Fed. 660 (C. C. N. Y., 1884); *Mercantile Trust Co. v. Atlantic & Pacific R. R. Co.*, 63 Fed. 513 (C. C. Cal., 1894); *Union Trust Co. v. Atchison, Topeka & Santa Fe R. R. Co.*, 8 N. M. 327; 43 Pac. 701 (1895). See as to prohibition in Texas act, *Western Union Tel. Co. v. Baltimore & Ohio Tel. Co.*, 22 Fed. 133 (C. C. Tex., 1884). In a note by Francis Wharton to *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.* (11 Fed. 1), *supra*, it is said (p. 12): "If an opposition company could run its wires on a parallel line, without incurring an expense which would be prohibitive, it is hard to see why the railroad company that makes a contract of this kind should not be bound to it." And in *Western Union Tel. Co. v. Chicago & Paducah R. R. Co.*, 86 Ill. 246, 252; 29 Am. Rep. 28, 31 (1877), the validity of such a contract was sustained, the court saying: "So long as any other company is left free to erect another line of poles, we see no just ground of complaint on the score of monopoly or the repression of competition." In *Pacific Postal Tel. Cable Co. v. Western*

§ 147. **Agreements not to bid.**—Another class of cases that seem erroneously classed with restrictions illegal as tending to produce monopolies, is that of agreements not to bid at sales, public or private,⁸ or for public contracts.⁹ The superficiality of the analogy may be indicated by the circumstance that while re-

Union Tel. Co., 50 Fed. 493 (C. C. Wash., 1892), a telegraph company having a grant of such exclusive right was not allowed an injunction against the construction of another telegraph line on the same road. In *Canadian Pacific Ry. Co. v. Western Union Tel. Co.*, 17 Canada Supm. Ct. 151, 161 (1889), a grant of such exclusive right was sustained against the objection that it created a monopoly. The court said: "The argument that an exclusive right to erect a telegraphic line along the line of railway is against public policy would seem to rest necessarily on this delusion, if it has any foundation at all, that the public generally have a right to erect telegraphic lines along and on the line of railroad, and therefore their exclusion of any such right may cripple and prevent competition and tend to create monopolies; but as the public have clearly no such rights, and as there is nothing to prevent telegraph lines from being erected contiguous to and parallel with railroads, provided the right of way is secure, how can it be said to cripple and prevent competition, and tend to create monopolies, any more than the erection of the line of telegraph unconnected with the railway by private individuals for their own exclusive use, on a line they have procured at their own expense, would prevent competition on a line parallel or contiguous thereto? What is there to prevent the erection of a dozen dif-

ferent lines by a dozen different companies for their own exclusive use respectively?"

⁸ See *Cleveland, Columbus, Cincinnati, etc., Ry. Co. v. Closser*, 126 Ind. 348, 361; 26 N. E. 159, 163; 9 L. R. A. 754, 761; 22 Am. St. Rep. 593, 604 (1890). For instances of illegal restrictions upon competition in bidding at a sale, see *Re Blake*, 150 Fed. 279; 80 C. C. A. 167 (8th C., 1906); *McClelland v. Citizens Bank*, 60 Neb. 90; 82 N. W. 319 (1900); *Coverly v. Terminal Warehouse Co.*, 70 App. D. 82; 75 N. Y. Suppl. 145 (1902); 85 App. D. 488; 83 N. Y. Suppl. 369 (1903); *Daily v. Hollis*, 27 Tex. Civ. App. 570; 66 S. W. 586 (1901).

⁹ See, for instance, *McMullen v. Hoffman*, 174 U. S. 639; 19 Supm. 839; 43 L. Ed. 1117 (1899); *Pendleton v. Asbury*, 104 Mo. App. 723; 78 S. W. 651 (1904); *Whalen v. Harrison*, 26 Mont. 316; 67 Pac. 934 (1902); *Baird v. Sheehan*, 38 App. D. 7; 56 N. Y. Suppl. 228 (1899); affirmed in 166 N. Y. 631; 60 N. E. 1107 (1901); *Jageman v. Necco*, 59 S. W. 822 (Tex. Civ. App. 1900). See also *Trentman v. Wahrenburg*, 30 Ind. App. 304; 65 N. E. 1057 (1903); *Re Salmon*, 145 Fed. 649 (D. C. Mo., 1906). So of agreement for withdrawal of bid. *Conway v. Garden City Paving, etc., Co.*, 190 Ill. 89; 60 N. E. 82 (1901). For statutory provisions relating to such agreements, see Ala. Civil Code (1907), §§ 3334-7; Ill. R. S. (Starr & Curtis' Ed., 1896), c. 38,

strictions tending to produce monopolies are regarded as objectionable on the ground that they *advance* prices, agreements not to bid are so regarded on the ground that they *reduce* them. The true ground of the condemnation of agreements not to bid seems rather to be that they operate as a *fraud* upon the person for whose benefit the sale is made.¹⁰

§ 148. **Combinations among owners of patents.**—As has been seen, the doctrine condemning restrictions upon competition does not apply, as a rule, to either patents, or restrictions imposed in granting a license.¹¹ It is now to be considered whether the monopoly enjoyed by the owner of a patent prevents the application to *combinations* among such owners of the rules applicable generally to restrictions upon competition. Thus far the prevailing opinion seems to have been that such rules are applicable thereto,¹² but this conclusion may not be free from doubt.¹³

§ 96; c. 127, § 9; also under Ind. (§ 210); Miss. (§ 219). In U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271, 293; 29 C. C. A. 141, 162; 46 L. R. A. 122, 137 (6th C., 1898), the term "conspiracy in restraint of trade," as used in the Federal anti-trust act, was held to apply to an agreement not to bid at a public letting. This decision was affirmed in 175 U. S. 211; 20 Supm. 96; 44 L. Ed. 136 (1899).

¹⁰ See 1 Bigelow on Fraud, c. 8, § 3, p. 580; 1 Story's Equity Jurisprudence, § 293. That such an agreement is not necessarily illegal, but that its legality depends on the intention of the parties and the effect of the arrangement, see Barnes v. Morrison, 97 Va. 372; 34 S. E. 93 (1899) and decisions cited.

As to validity of such agreements, as being for mutual benefit,

see, for instance, Venner v. Denver Union Water Co., 40 Colo. 212, 240; 90 Pac. 623, 632; 122 Am. St. Rep. 1036 (1907); Starkweather v. Jenner, 27 App. D. C. 348 (1906); Virginia Bridge & Iron Co. v. Crafts, 58 S. E. 322 (Ct. App. Ga., 1907); Mallon v. Buster, 121 Ky. 379; 89 S. W. 257; 123 Am. St. Rep. 201 (1905); Satterfield v. Kindley, 144 N. C. 455; 57 S. E. 145; 15 L. R. A. N. S. 399 (1907); Henderson v. Henrie, 61 W. Va. 183; 56 S. E. 369 (1907); Fidelity Ins., etc., Co. v. Roanoke St. Ry. Co., 98 Fed. 475 (C. G. Va., 1899).

¹¹ See § 112.

¹² For illustrations see National Harrow Co. v. Quick, 67 Fed. 130 (C. C. Ind., 1895); National Harrow Co. v. Hench, 76 Fed. 667 (C. C. Pa., 1896); affirmed in 83 Fed. 36; 27 C. C. A. 349; 3 L. R. A.

¹³ In Columbia Wire Co. v. Freeman Wire Co., 71 Fed. 302 (C. C. Mo., 1895), however, a corporation organized under the laws of Illinois,

for acquiring patents and granting licenses thereunder, and in possession of many, if not all, of the valuable patents for the manufacture

299 (3d C., 1897; holding it no justification that the parties are exposed to litigation); *Strait v. National Harrow Co.*, 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891; with a query whether the same rule would apply to an agreement limited to the life-time of the patents); *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 31 Pac. 581; 31 Am. St. Rep. 242 (1892; distinguishing the case of an agreement by the seller of a patent-right). See also, § 120. Compare *American Soda-Fountain Co. v. Green*, 69 Fed. 333 (C. C. Pa., 1895); *A. B. Farquhar Co. v. National Harrow Co.*, 102 Fed. 714; 42 C. C. A. 600; 49 L. R. A. 755 (3d C., 1900); *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629 (1887). As to patentee so contracting with reference to his monopoly as to create another monopoly in an unpatented article, see *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288; 25 C. C. A. 267; 35 L. R. A. 728 (6th C., 1896).

In *General Electric Co. v. Wise*,

of barbed wire, and the machines for so doing, and which had granted a large number of licenses under its patents, was held not subject to the anti-trust laws of Illinois, so as to defeat a suit by it for infringement of a patent. The court doubted *National Harrow Co. v. Quick*, supra, but held it perhaps distinguishable on the ground that in the case at bar the licensees were not restricted as to prices for wire manufactured under their licenses. This decision was cited in *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364, 370; 61 C. C. A. 334, 340 (9th C., 1903), where it was regarded as "too plain to re-

quire discussion," that "the provisions of a State law cannot affect rights acquired under a patent of the United States." See *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, infra.

In *Indiana Manuf. Co. v. J. I. Case Threshing Mach. Co.*, 148 Fed. 21 (C. C. Wis., 1906), was held invalid under the Federal anti-trust act "a combination of manufacturers to restrain competition in the make and sale of their products, with merger of the patents in one ownership as a means employed for that purpose," such monopoly being "both intended and accomplished without reference either to any spe-

119 Fed. 922, 924 (C. C. N. Y., 1903), it was thought, though not decided, that the grantee of a patent is not deprived of the right to relief against infringement thereof, because of his violation of the Federal anti-trust act. And so in case of a copyright. See *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 190 (C. C. N. Y., 1905). As to proprietary medicines, see *Miles Medical Co. v. Platt*, 142 Fed. 606 (C. C. Ill., 1906).

State anti-trust legislation was given effect in, for instance, *National Harrow Co. v. Bement*, 21 App. D. 290, 297; 47 N. Y. Suppl. 462, 468 (1897; as to reversal, see § 120).

As to validity of proposed legislation by State designed to prevent owner of patent "from extending his power to the creation of other and further monopolies which have not been granted him by any Federal authority," see *Re Opinion of the Justices*, 193 Mass. 605; 81 N. E. 142 (1907).

cific invention or the validity of any patent and not referable alone to any patent or groups of patents." Here was explained and distinguished *Bement v. National Harrow Co.*, 186 U. S. 70; 22 Supm. 747; 46 L. Ed. 1058 (1902). But this was reversed in 154 Fed. 365; 83 C. C. A. 343 (7th C., 1907), where, in allowing relief to a licensor against invasion by a licensee of a "lawful patent monopoly," it was said with reference to an "attack upon (the licensor's) license system, based upon the number of licensees," that "this resulted, without any concert of action on the part of the licensees, solely from a policy pursued by (the licensor) through a course of years."

In *Blount Manuf. Co. v. Yale & Towne Manuf. Co.*, 166 Fed. 555 (C. C. Mass., 1909), was held invalid under such act, an agreement among owners of patents by which each "agreed to restrain his own trade in the article of his own invention, not as an incident to a granting of rights, but for the purpose of enhancing his price by the removal of competitors."

In *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 142 Fed. 531 (C. C. Wis., 1906), the patent in question (for a rubber tire), having been declared invalid by the Circuit Court of Appeals for the

Sixth Circuit, a license contract was held non-enforceable as an illegal restriction upon competition (within the view of the Federal anti-trust act), in the territory included in such circuit, also as "creating a fund for crushing competition in interstate commerce throughout the whole country, as well in the Sixth Circuit as elsewhere, and not only competition in the G. tires between outside manufacturers and those who are in the combination, but competition of all other rubber tires against the G. tires." It was said that in these two ways were secured "illegitimate results, in their very nature unlawful, neither contained within nor essential to the patent monopoly." But this was reversed in 154 Fed. 358; 83 C. C. A. 336 (7th C., 1907), holding the act not violated by a "requirement that the licensee join other licensees in a combination or pool to control the prices and output of an innocuous patented article," it being said: "Patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several States." See *Goshen Rubber Works v. Single Tube Automobile, etc., Tire Co.*, 166 Fed. 431 (C. C. A., 7th C., 1908).

CHAPTER XV

RESTRICTIONS UPON COMPETITION AS RESULTING FROM ACTS OF CORPORATIONS

- § 149. Acts of corporation, in combination with individuals or other corporations.
- 150. Acts of single corporation.
- 151. Organization of corporation for purpose of creating restriction.
- 152. General powers of corporation as limited by doctrine against restrictions.
- 153. Ultra vires acts.
- 154. Entering into partnership.
- 155. Holding of stock in another corporation.
- 156. Consolidation of corporations.
- 157. Acts of stockholders as acts of corporation.
- 158. Foreign corporations.

§ 149. **Acts of corporation, in combination with individuals or other corporations.**—Under modern conditions of business, restrictions upon competition are increasingly the results of acts of corporations rather than of mere individuals. In some cases such a restriction is the result of acts of corporations in combination with mere individuals or with other corporations. Under such conditions, save as hereinafter specified, there seems to be no difference in legal effect between the acts of corporations and those of mere individuals.¹

¹ For instances of acts of corporations held illegal, just as, apparently, would have been the same acts, if done by an individual or combination of individuals, see *Clancey v. Onondaga Salt Manuf. Co.*, 62 Barb. (N. Y.) 395 (1862); *Strait v. National Harrow Co.*, 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891). See articles in 13 Harv. Law Rev. 198, 265 (1899-1900) by

E. Q. Keasbey; 16 Id. 79 (1902-3) by R. L. Raymond; 42 Am. Law Reg. N. S. (1903) by Norman Grey; 1 Columbia Law Rev. 235 (1901) by Albert Stickney; 3 Va. Law Reg. 163, 241, 254 (1897-8) by W. L. Royall. In *Tribolet v. U. S.*, 95 Pac. 85; 16 L. R. A. N. S. 223 (Supm. Ct. Ariz., 1908), it was held no objection to holding an officer and stockholder guilty of vio-

§ 150. **Acts of single corporation.**—Not only may a restriction upon competition result from the acts of a corporation in combination with mere individuals or with other corporations, but it may, and not infrequently does, result from the acts of a single corporation, thus where it acquires a monopoly, or approximately a monopoly, of the production and sale of a given commodity. There is here indeed an absence of the element of combination, save in so far as there exists a combination between the corporation and its stockholders or among the stockholders. But, in accordance with the view already expressed, such restriction is just as illegal as if it had been the result of a combination among individuals.²

lation of the Federal act, that in the same proceeding the corporation itself was held not liable.

As to liability of corporation for criminal conspiracy, see § 13. Many of the anti-trust acts contain provisions specially applicable to corporations. See c. XX. As to extent of power of Congress to restrain the action of a corporation created under State law, see § 178.

² See § 129. Thus in *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448; 41 N. E. 188; 47 Am. St. Rep. 200 (1895), a corporation concededly illegal in its organization (the *Distilling & Cattle Feeding Co.*), was held illegal on the ground of it succeeding to what was held to be an illegal "trust" (the *Distillers & Cattle Feeders' Trust*). The court said (156 Ill. 490; 41 N. E. 202: "The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as the holders of the capital stock of the corporations, and as a majority of the directors of each, controlled such corporate property, became the sub-

scribers for all the stock of the new corporation, and its board of directors. The conveyance and transfer of the properties of the constituent companies to the new corporation, was merely a transfer by the trustees to themselves, though in a slightly different capacity; and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies as before. The trust then being repugnant to public policy, and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country, over production and prices, and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the or-

§ 151. Organization of corporation for purpose of creating restriction.—If a restriction upon competition resulting from the acts of a single corporation, concededly legal as to its organization, be illegal, *a fortiori* the organization of a corporation for

ganization of the corporation.” To similar effect, *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247, 267 (1899). See also *Finck v. Schneider Granite Co.*, 187 Mo. 244, 268; 86 S. W. 213, 220; 106 Am. St. Rep. 452 (1905).

But in *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288, 300; 59 Atl. 1088, 1092; 105 Am. St. Rep. 812 (1904), where there was held to be no illegal restriction upon competition, it was said: “The professed purpose in organizing these large corporations is not to kill competition, but to cheapen production in the interest of the public. Yet, whatever the real purpose, competition is stopped by an entirely lawful method.” It was said in *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 364; 36 Atl. 971, 976 (1897); affirmed as *Miller v. American Tobacco Co.*, 56 N. J. Eq. 847; 42 Atl. 1117 (1898): “The fact that a corporation is an entity, representing an aggregation of skill and capital, does not curtail its right to transact the business which the State’s charter empowers it to conduct, with exactly the same freedom as a citizen. So long as by the policy of this State the formation of corporations is permitted, so long will the right of such artificial persons to act within the scope of their franchises, be in no sense different from the right of an individual. The control of a court of equity over the business conduct of either is exactly the same. The contracts of either will

be rectified, annulled or specifically enforced, and the duties of either as trustee, or its right as *cestui que trust*, will be enforced and protected. Any illegal conduct of either, leading to irreparable injury, will be enjoined. A nuisance created by either will be restrained. Indeed, whenever either an individual or corporation become related to any other individual or corporation, so that equitable jurisdiction arises to remedy some wrong or secure some right, it matters not whether both parties are individuals or both corporations, or that one is a natural and the other an artificial person.” But although the views thus expressed seem substantially correct, they also seem to have been wrongly applied. Here relief was denied against the conduct by a corporation of its business in a certain manner, thus on the ground that it would have been lawful for an individual to conduct his business in the same manner. It disposed of its goods through “consignment agreements” with “jobbers.” The court said (55 N. J. Eq. 363; 36 Atl. 975): “Assume that it appears that the company has so enforced its consignment agreement as to make it practically impossible for any jobber to handle its goods, and at the same time to deal in goods made by others, and assume that from such conduct the alleged consequences flow, the query remains, what power has this court to interfere at the instance of either the attorney-general or of any job-

the purpose of creating an illegal restriction upon competition is illegal.³

§ 152. **General powers of corporation as limited by doctrine against restrictions.**—Certain powers, such as the power to hold

ber? If the conduct now the subject of complaint had been that of an individual manufacturer instead of a corporation, I do not imagine that any lawyer would think of pressing before any court the proposition that such conduct could be enjoined. An individual manufacturer can sell his manufactured stock to whom he pleases, on any terms he pleases, and can refuse to sell to any one with whom, for his own reasons, however capricious, he does not care to deal. He can select his agents to sell his goods, and fix any rate of commissions. He can accompany his consignment to such agent with such restrictions as to the price or the terms of sale, or in respect to the parties to whom he may sell, as he pleases. Within these limits the power of an owner of manufactured goods is absolute." But suppose such individual manufacturer, by the extent and variety of his operations, to be able to control the trade? The question might then well arise whether relief might not be granted against his acts. As it is, the case supposed by the court is not parallel with that before it. See under S. C. (§ 229), for elaborate effort to include under the definition of a monopoly such restrictions as are effected through the medium of a single corporation. As to effect of Federal act, see § 196.

See generally, articles in 20 Harv. Law Rev. 167 (1907) by Herbert Pope; 19 Pol. Sci. Quart. 173 (1904) by A. D. Adams.

³ Thus in *Harding v. American Glucose Co.*, 182 Ill. 551, 616, 632; 55 N. E. 577, 599, 604; 64 L. R. A. 738, 764, 770; 74 Am. St. Rep. 189 (1899), was held illegal "the organization of a new corporation and the conveyance thereto of all the property owned by six competing corporations and the execution of agreements by the corporations thus parting with their property, not any longer to engage in the manufacture of the industrial products in which they had been previously engaged." Those controlling the new corporation were for the most part the same persons who were interested in and controlled one or more of the conveying corporations, and many of the stockholders in the old corporations were stockholders in the new. See also *Evans v. American Strawboard Co.*, 114 Ill. App. 450 (1904); *Brownsville Glass Co. v. Appert Glass Co.*, 136 Fed. 240 (C. C. Pa., 1905). So in *Richardson v. Buhl*, 77 Mich. 632, 657; 43 N. W. 1102, 1110; 6 L. R. A. 457, 465 (1889), the objects of a corporation (the Diamond Match Company) were held illegal under the conditions thus described: "The business in which it is engaged is making friction matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all of that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby pre-

property or to manufacture or buy or sell, are commonly conferred on a corporation in general terms without any express limitation, save as to their necessity for the exercise of the business. The question whether such powers are subject to an implied limitation, namely, that they shall not be exercised to the extent of creating an illegal restriction upon competition, seems somewhat unsettled.⁴

venting all competition in the sale of the article manufactured. This is the mode of conducting the business, and the manner of carrying it on. The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus, both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 of people." See under Mich. (§ 217); Tex. (§ 232). Exclusive privileges sought to be secured under a *general law* were held illegal in *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268, 297; 22 N. E. 798, 804; 8 L. R. A. 497, 506; 17 Am. St. Rep. 319, 336 (1889), a case of a corporation formed with power to purchase and hold the capital stock of any gas company in Chicago. On the other hand, in *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; 9 N. E. 629 (1887), a combination regarded as not otherwise illegal as in restriction of competition, was held not made so illegal by reason

of the parties to the combination forming themselves into a corporation.

That it will not be presumed that the organization of a corporation is for the purpose of creating an illegal restriction upon competition, see *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58, 65; 42 N. E. 403 (1895); *Locker v. American Tobacco Co.*, 121 App. D. 443; 106 N. Y. Suppl. 115 (1907). As to effect of prohibition against combination as including action of single corporation or its stockholders, see under Ill. (§ 209). As to application of Federal act to organization of corporation under State law, see § 178. Whether prohibition against "combination to create or carry out restrictions in trade or commerce" applies to the organization of corporation for that purpose, see under Tex. (§ 232). Compare under Mich. (§ 217).

See, on the general subject, article in 13 Harv. Law Rev. 198, 265 (1899-1900) by E. Q. Keasbey.

⁴ In *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448; 41 N. E. 188; 47 Am. St. Rep. 200 (1895), where the acquiring of distillery property by a corporation was held illegal as in restriction upon competition, it was held no defense that by its charter it was authorized to purchase and own distillery property, there being no limit placed on

§ 153. **Ultra vires acts.**—There is an obvious distinction between basing the illegality of an act on the ground of it being in restriction upon competition and basing it on the ground of it being *ultra vires*.⁵ The distinction seems, however, to have

the amount of property that it might thus acquire. See, however, under Mo. (§ 220), *State ex inf. v. Crow v. Continental Tobacco Co.*, 177 Mo. 1, 38; 75 S. W. 737, 748 (1903), a case of a purchase by a duly organized corporation of the assets of another, Distilling and Cattle Feeding Co. v. People being here distinguished. And in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 524; 43 Atl. 723, 729; 46 L. R. A. 255, 263; 78 Am. St. Rep. 612 (1899), the general statutory authority of a corporation to purchase, hold and use property appropriate for its business, and to purchase and hold the stock of other corporations, was held to enable purchases from competitors that tended to restrict and even temporarily destroy competition. To similar effect, *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 545; 54 Atl. 570, 573 (1903). See also *Metcalf v. American School Furniture Co.*, 122 Fed. 115, 121 (C. C. N. Y., 1903).

⁵ The grounds on which corporate acts may be held illegal as *ultra vires* are very numerous. Here are given only a few instances more or less closely related to restrictions upon competition. In *Gulf, Colorado & Santa Fe Ry. Co. v. State*, 72 Tex. 404; 10 S. W. 81; 1 L. R. A. 849; 13 Am. St. Rep. 815 (1888), the provision of the Texas constitution that "no railroad . . . or managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation

with . . . or in any way control any railroad corporation owning or having under its control a parallel or competing line," was held to invalidate an agreement among competing railroad companies for fixing rates of transportation, so as to prevent competition among the parties to the contract. So in *Central & Montgomery R. R. Co. v. Morris*, 68 Tex. 49; 3 S. W. 457 (1887), it was held to invalidate a lease. See, as to effect of the New Hampshire act of 1867 to prevent railroad monopolies, *Manchester & Lawrence R. R. v. Concord R. R.*, 66 N. H. 100, 130; 20 Atl. 383, 385; 9 L. R. A. 689, 694; 49 Am. St. Rep. 582 (1890); of the Missouri act prohibiting a railroad from owning, etc., a competing line, *Kimball v. Atchison, Topeka & Santa Fe R. Co.*, 46 Fed. 888 (C. C. Mo., 1891); of the Ohio act against leasing such, *Hafer v. Cincinnati, H. & D. R. R. Co.*, 29 Weekly L. Bull. 68 (Hamilton Co., Ohio, Com. Pl., 1893). See also for instance of unauthorized lease to competing railroad corporation, *Eel River R. R. Co. v. State*, 155 Ind. 433, 457; 57 N. E. 388, 396 (1900). As to provision of the Pennsylvania constitution forbidding the acquisition of the rights of a parallel and competing railroad by another corporation, see *Pennsylvania R. Co. v. Commonwealth*, 7 Atl. 368 (Supm. Ct. Pa., 1886); *Catawissa R. R. Co. v. Philadelphia & Reading R. R. Co.*, 14 Pa. Co. 280 (1889). In *Colles v. Trow City Directory Co.*,

been overlooked in certain decisions basing the illegality on the former ground, when it might well have been based on the latter.⁶ Obviously, save, of course, in case of the existence of a constitutional prohibition, a corporate act authorized by statute is not open to objection as creating an illegal restriction upon competition.⁷

§ 154. **Entering into partnership.**—In several instances the decision of the question whether acts of a corporation were illegal as in restriction upon competition has been rendered unnecessary by an application of the doctrine that it is illegal for a corporation to enter into a partnership.⁸ This state-

11 Hun (N. Y.), 397 (1877), was held *ultra vires* the use of funds of a corporation for the purpose of destroying competition.

⁶ See *McCutcheon v. Merz Cap-sule Co.*, 71 Fed. 787; 19 C. C. A. 108; 31 L. R. A. 415 (6th C., 1896). Thus, in *State v. Nebraska Distilling Co.*, 29 Neb. 700; 46 N. W. 155 (1890), on the ground that it was *ultra vires* for the corporation to sell all its property, real and personal, together with its franchises and powers necessary to carry on business. So, too, it would seem, in *Harding v. American Glucose Co.*, 182 Ill. 551, 625; 55 N. E. 577, 602; 64 L. R. A. 738, 767; 74 Am. St. Rep. 189 (1899). So, in *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268, 286; 22 N. E. 798, 800; 8 L. R. A. 497, 503; 17 Am. St. Rep. 319, 327 (1889), on the want of power to hold stock in another corporation. Compare *Elyton Land Co. v. Dowdell*, 113 Ala. 177; 20 So. 981; 59 Am. St. Rep. 105 (1896); *Morris v. Elyton Land Co.*, 125 Ala. 263; 28 So. 513 (1900).

⁷ Thus, in *Stewart v. Erie & Western Transp. Co.*, 17 Minn. 372, 396 (1871), a traffic contract entered into by a railroad corporation, that

it was authorized to make, was held not illegal, though resulting in a practical monopoly. See, however, as to grant of exclusive privilege to manufacture and sell gas, *City of St. Louis v. St. Louis Gas-light Co.*, 70 Mo. 69, 119 (1879).

⁸ Thus, in *People v. North River Sugar Refining Co.*, 121 N. Y. 582; 24 N. E. 834; 9 L. R. A. 33; 18 Am. St. Rep. 843 (1890), where was affirmed a judgment dissolving a corporation, the court did not, as did the court below in 54 Hun, 354; 7 N. Y. Suppl. 406; 5 L. R. A. 386 (1889), base its decision on the ground that the acts were in restriction upon competition, but on the ground that it is illegal for a corporation to enter into a partnership, in this case a "trust," described as "in substance and effect a partnership of twenty separate corporations." To the same effect, in case of a similar agreement, *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137, 185; 30 N. E. 279, 290; 15 L. R. A. 145, 159; 34 Am. St. Rep. 541, 552 (1892), where it was said: "Whether the agreement should be regarded as amounting to a partnership between the several com-

ment of the doctrine, unqualified, seems, however, too broad.⁹

§ 155. **Holding of stock in another corporation.**—Though the power of a corporation to hold stock in another in the absence of statutory authority has sometimes been broadly denied,¹⁰

panies, limited partnerships and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and, being enjoined by the terms of the agreement to endeavor to have 'the affairs' of the several companies managed in a manner most conducive to the interest of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership, and by the terms of the agreement, to select such directors of the company as they may see fit, nay more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformable to the purpose for which it was created by the laws of its State. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York city, and organized for a purpose contrary to the policy of our laws." And similar agreements were held illegal, as providing for a corporation becoming a partner, in *Bishop v. American Preservers' Co.*, 157 Ill. 284; 41 N. E. 765; 48

Am. St. Rep. 317 (1895); *American Preservers' Trust v. Taylor Manuf. Co.*, 46 Fed. 152 (C. C. Mo., 1891); *Mallory v. Hanaur Oil Works*, 86 Tenn. 598; 8 S. W. 396 (1888). See also *Wallerstein v. Ervin*, 112 Fed. 124; 50 C. C. A. 129 (3d C., 1901); *Fechteler v. Palm*, 133 Fed. 462; 66 C. C. A. 336 (6th C., 1904); *Breinig v. Sparrow*, 39 Ind. App. 455; 80 N. E. 37 (1907); *Franz v. William Barr Co.*, 132 Mo. App. 8; 111 S. W. 636 (1908); *Geurinck v. Alcott*, 66 Ohio St. 94; 63 N. E. 714 (1902). See also *Sabine Tram Co. v. Baneroff*, 16 Tex. Civ. App. 170; 40 S. W. 837 (1897); *Wilson v. Carter Oil Co.*, 46 W. Va. 469; 33 S. E. 249 (1899); *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22; 50 S. E. 76; 112 Am. St. Rep. 936 (1905). It was declared *prima facie* illegal for a corporation to enter into a partnership, in *Boyd v. American Carbon Black Co.*, 182 Pa. St. 206; 37 Atl. 937 (1897).

⁹ See discussion in Green's *Brice's Ultra Vires* (2d Am. Ed.), p. 423, note; also *Bates v. Coronado Beach Co.*, 109 Cal. 160; 41 Pac. 855 (1895), where it was said: "There is no rule of law that will preclude a corporation from entering into a contract with an individual, which will have the effect to carry out, directly or indirectly, the object of its incorporation, and to provide in that agreement that the gains or losses of the venture shall be borne equally by both parties."

¹⁰ On the general subject, see 1

there seems to be a tendency at least to base the illegality of such holding on the existence of circumstances producing or tending to produce an illegal restriction upon competition.¹¹ The power to hold stock in another corporation is now, however, very commonly expressly conferred by statute.¹²

Cook on Corporations, 5th ed., §§ 64, 314. As to holding by foreign corporation of stock of domestic, see *MacGinniss v. Boston, etc., Consolidated Copper & Mining Co.*, 29 Mont. 428, 458; 75 Pac. 89, 96 (1904).

¹¹ In *De La Vergne Refrigerating, etc., Co. v. German Savings Inst.*, 175 U. S. 40; 20 Supm. 20; 44 L. Ed. 65 (1899), the power of a manufacturing corporation to purchase the stock of a rival corporation for the purpose of suppressing competition and obtaining the management of such corporation was denied. See also *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396; 45 C. C. A. 354; 52 L. R. A. 734 (4th C., 1901). To like effect, in case of such purchase for the purpose of creating a monopoly in the telephone business, *Dunbar v. American Telephone, etc., Co.*, 224 Ill. 9; 79 N. E. 423; 115 Am. St. Rep. 132 (1906). See subsequent decision in 87 N. E. 521, 532, 534 (1909), where, on the application of minority stockholders the purchasing corporation was required to surrender the stock to the rightful owners upon equitable terms.

In *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869 (C. C. Mich., 1907), the illegality of an attempt to create a monopoly by purchase of stock of another corporation was held not prevented by the circumstance of it being proposed to be effected in part by the holding of proxies. See as to power

of railroad corporation to acquire stock in another, *Central R. R. Co. v. Collins*, 40 Ga. 582 (1869); *Hazlehurst v. Savannah, etc., R. R. Co.*, 43 Ga. 13, 57 (1871). See note 12, *infra*; also under Kan. (§ 212); Mont. (§ 221); article in 22 Harv. Law Rev. 114 (1908) by G. C. Todd.

¹² See for instance *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 541; 54 Atl. 570, 571 (1903); *Metcalf v. American School Furniture Co.*, 122 Fed. 115, 125 (C. C. N. Y., 1903). In *Raferty v. Buffalo City Gas Co.*, 37 App. D. 618; 56 N. Y. Suppl. 288 (1899), the main question was as to the application of such a statute.

By Ohio R. S. (Bates' Ed., 1906), § 3256, "a private corporation may purchase or otherwise acquire and hold shares of stock in other kindred, but not competing, private corporations, whether domestic or foreign, but this shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition." See also under Ga. (§ 207); Miss. (§ 219); Neb. (§ 222); Okla. (§ 228). In *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 545; 54 Atl. 570, 573 (1903), was denied relief sought against the acquiring of stock in another corporation, the doctrine being applied that "where a monopoly results or may result from the exercise of the powers of making contracts expressly granted

§ 156. **Consolidation of corporations.**—The power of corporations to consolidate is purely a creation of statute.¹³ Statutes conferring such power frequently exclude consolidation of competing corporations, particularly railroad corporations.¹⁴ But save, of course, in case of the existence of a constitutional prohibition, the consolidation of competing corporations is, if authorized by statute, open to no objection on the ground of public policy.¹⁵

§ 157. **Acts of stockholders as acts of corporation.**—Notwithstanding the well-established technical distinction between a corporation and its members, as legal entities, there has developed a strong tendency to regard acts of a combination of stockholders in restriction upon competition, as in effect the

by the legislature to corporations such exercise of power cannot be enjoined." As to effect of general prohibition of anti-trust act, in view of express authority to hold stock in another corporation, see under Mich. (§ 217); N. Y. (§ 224).

¹³ See 3 Cook on Corporations, 5th ed., § 892.

¹⁴ In nearly all the States there are statutes or constitutional provisions expressly prohibiting the consolidation, sale, lease or the like, of competing railroad lines, in some instances of telegraph, telephone and other lines. For numerous decisions construing such provisions, see 3 Cook on Corporations, 5th ed., §§ 892 et seq.; Noyes on Intercorporate Relations, §§ 32 et seq. See article in 27 Am. Law Rev. 330 (1893) by J. C. Thomson.

As to effect of general prohibition of anti-trust act, in view of express authority to hold stock in another corporation, see Attorney-General v. Consolidated Gas Co., 124 App. D. 401; 108 N. Y. Suppl. 823 (1908); Matter of Attorney-General, 125

App. D. 804; 110 N. Y. Suppl. 186 (1908).

¹⁵ In *Cameron v. N. Y. & Mt. Vernon Water Co.*, 62 Hun, 269; 16 N. Y. Suppl. 757 (1891), it was said: "The consolidation of corporations engaged in the same general line of business is not against public policy. The legislature has permitted it for years and still permits it. There is a great difference between the consolidation of two corporations into one new corporation, and the combination between two existing corporations for the prevention of competition. The former is permitted and the latter is condemned. It is not necessary to point out the distinction so far as the public or private good is concerned. It is enough that the legislature has drawn the distinction." See *People ex rel. v. People's Gas Light & Coke Co.*, 205 Ill. 482; 68 N. E. 950; 98 Am. St. Rep. 244 (1903).

As to prohibition of Ohio statute against sale of property of corporation for the formation of a trust, etc., see § 227.

act of the corporation, so far as legal consequences are concerned, though technically there has been no corporate act whatever. Thus it is said: "Where all, or a majority, of the stockholders comprising a corporation, do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company in the same manner as if it had been a formal resolution of its board of directors; and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the State in a proceeding in *quo warranto*." ¹⁶

§ 158. **Foreign corporations.**—The general power of a State to exclude a foreign corporation from the right to transact business therein, unquestionably includes the power to exclude on the ground of engaging in transactions that produce, or tend to produce, an illegal restriction upon competition.¹⁷ It may

¹⁶ State ex rel. v. Standard Oil Co., 49 Ohio St. 137, 184; 30 N. E. 279, 289; 15 L. R. A. 145, 158; 34 Am. St. Rep. 541, 551 (1892), where the agreement held illegal was not executed by the corporation itself, but by all the stockholders. It was contended that the corporation was a legal entity separate from its stockholders, and that their acts could not be ascribed to the corporation. Under similar conditions an agreement was held illegal in American Handle Co. v. Standard Handle Co., 59 S. W. 709, 720 (Tenn. Ch. App., 1900). The general rule was also applied in Southern Electric Securities Co. v. State, 91 Miss. 195; 44 So. 785; 124 Am. St. Rep. 638 (1907). Compare First National Bank of Chicago v. Trebein

Co., 59 Ohio St. 316, 326; 52 N. E. 834, 837 (1898). Similarly the unlawfully becoming a member of a partnership was, in People v. North River Sugar Refining Co., 121 N. Y. 582; 24 N. E. 834; 9 L. R. A. 33; 18 Am. St. Rep. 843 (1890), held to be the action of the corporation itself, and not of the stockholders as mere individuals. See also People ex rel. v. American Sugar Refining Co., 7 Ry. & Corp. L. J. 83 (Super. Ct. San Francisco, 1890). See under Federal act (§ 197); under Ill. (§ 209).

¹⁷ Thus violation of an "anti-trust" law; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; 20 Supm. 518; 44 L. Ed. 657 (1900); affirming 19 Tex. Civ. App. 1; 44 S. W. 936 (1898); Hammond Packing

not be clear, however, that this includes the power to prevent a foreign corporation from engaging in transactions that con-

Co. v. Arkansas, 212 U. S. 322, 343; 29 Supm. 370, 377 (1909); Attorney-General ex rel. Wolverine Fish Co. v. Booth, 143 Mich. 89; 106 N. W. 868 (1906); State v. Virginia-Carolina Chemical Co., 71 S. C. 544, 559; 51 S. E. 455, 461 (1905). Compare Connolly v. Union Sewer Pipe Co., 184 U. S. 540; 22 Supm. 431; 46 L. Ed. 679 (1902); State ex rel. v. Standard Oil Co., 110 S. W. 565, 579 (Supm. Ct. Tenn., 1908). In Euston v. Edgar, 207 Mo. 287; 105 S. W. 773 (1907), the anti-trust legislation of the State was held applicable, though a foreign corporation was "the agent or instrument to carry out the purpose of the agreement" in question. In Southern Electric Securities Co. v. State, 91 Miss. 195; 44 So. 785; 124 Am. St. Rep. 638 (1907), a corporation organized in another State under the terms of a contract and for the purpose of controlling a domestic corporation, in violating the anti-trust laws of the State was enjoined from taking action having relation to and in furtherance of such contract. In several instances the anti-trust acts are by their terms expressly applicable to foreign corporations. See under the different statutes, c. XX.

As to power to exclude because of acts done beyond the State; also as to distinction between corporations and individuals as to power to exclude; also as to objection of impairment of obligation of contract by revocation of permit to foreign corporation to do business, see Hammond Packing Co. v. Arkansas, supra.

As to jurisdiction of U. S. Supreme Court over controversy between a State and a corporation of another State, see Minnesota v. Northern Securities Co., 184 U. S. 199, 234; 22 Supm. 308, 321; 46 L. Ed. 499 (1902).

In Harding v. American Glucose Co., 182 Ill. 551, 633; 55 N. E. 577, 605; 64 L. R. A. 738, 770; 74 Am. St. Rep. 189 (1899), relief was granted against a transfer of property by one foreign corporation to another, such transfer being regarded as an incident of an illegal restriction upon competition. Nearly all the parties "organizing and engineering" the combination producing such restriction were citizens of Illinois. The property transferred consisted largely of real estate located in Illinois, and required for the business of the corporation transacted in the State, and other corporations making similar transfers also incidents of the same illegal restriction were "operating their plants" in Illinois. The court said (182 Ill. 637; 55 N. E. 606; 64 L. R. A. 772): "When these foreign corporations come into this State to do business, they must conform to the laws and public policy of this State. . . . If real estate in Illinois owned by domestic corporations cannot be used for the purpose of carrying out the business of an illegal trust or combination, real estate in Illinois owned by a foreign corporation cannot be used for such a purpose."

See also under Ark. (§ 205); Mo. (§ 220); Tenn. (§ 231); Tex. (§ 232); also articles in

stitute commerce within the scope of the commerce clause of the Federal constitution, even though such transactions produce, or tend to produce, an illegal restriction upon competition.¹⁸

51 Cent. L. J. 45 (1900) by D. H. Pingrey; 5 Chicago Weekly L. J. 128, 135 (1900) by W. A. Conover; 4 Columbia Law Rev. 153 (1904) by C. C. Marshall. Of course an unconstitutional statute does not operate as a withdrawal of consent to a foreign corporation to transact business in the State. *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816 (C. C. Neb., 1901), with which decision, however, *Hartford Fire Ins. Co. v. Perkins*, 125 Fed.

502 (C. C. S. D., 1903) seems not in harmony. See also, as to unconstitutionality of statute imposing restrictions upon foreign corporation, *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121, 125 (C. C. Iowa, 1903).

¹⁸ It seems to have been held that such power is included, in *People ex rel. v. American Tobacco Co.*, 2 Chicago L. J. Weekly, 249 (Cook Co. Cir. Ct., 1897?). See also § 178.

CHAPTER XVI

CONTRACTS IN RESTRAINT OF TRADE

- § 159. The doctrine against contracts in restraint of trade.
160. Prevention of restriction upon competition, not basis of doctrine.
161. Inapplicability of test of space limit to restrictions upon competition.

§ 159. **The doctrine against contracts in restraint of trade.**—Generally speaking, though with important exceptions presently to be considered, what are commonly known as contracts in restraint of trade have always been regarded as illegal at common law. This doctrine was established as early as the beginning of the fifteenth century, in its original form condemning any agreement whereby any person bound himself not to exercise his trade.¹ It seems clear that the doctrine, in its origin, being based on grounds of public policy,² had reference simply to the supposed evil resulting from the withdrawal from trade of one actively engaged therein, whether such evil be regarded as

¹ Thus, a contract not to use the art of a dyer's craft within a certain city for half a year was condemned with the exclamation by Hull, J.: "And, by G—d, if the plaintiff were here he should go to prison until he paid a fine." Year Book, 2 Henry 5, fol. 5, pl. 26 (1415).

See generally, as to the doctrine and its application, article on "Restraint of Trade" in 24 Am. & Eng. Enc. of Law, 2d ed., p. 841. For a statutory declaration of the doctrine, see Cal. Civil Code, § 1673, which has in several instances been adopted elsewhere. See Merchants' Ad-Sign Co. v. Sterling, 124 Cal.

429; 57 Pac. 468; 46 L. R. A. 142; 71 Am. St. Rep. 94 (1899); Getz v. Federal Salt Co., 147 Cal. 115; 81 Pac. 416; 109 Am. St. Rep. 114 (1905); U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co., 126 Fed. 364; 61 C. C. A. 334 (9th C., 1903). See also under Mich. (§ 217).

² The interest of the *public alone*, and not of the parties to the contract, being considered, according to Lawrence v. Kidder, 10 Barb. (N. Y.) 641, 648 (1851); and see Greenwood on Public Policy, p. 686; but see Beal v. Chase, 31 Mich. 490, 521 (1875).

consisting of the increased danger of his becoming a public burden, or simply a diminution of the production of commodities useful to the public.³ Save for the comparatively recent introduction of the exception of reasonable contracts, it is the general doctrine that a contract in total restraint of trade, that is, without limit as to space, is illegal.⁴ But it has not generally been regarded as necessary that the contract embrace the entire world in order that it be thus illegal. In this country it has frequently been considered sufficient that it embrace merely the territory of a single State,⁵ though there is a tendency to relax so arbitrary a rule, so that the contract must embrace at least the entire United States.⁶

³ According to 2 Parsons on Contracts (8th ed.), p. 872 (star p. 749), the doctrine grew out of the law of apprenticeship, it being here said: "By this law, in its original severity, no person could exercise any regular trade or handicraft except after a long apprenticeship, and, generally, a formal admission to the proper guild or company. If he had a trade, he must continue in that trade, or have none. To relinquish it, therefore, was to throw himself out of employment; to fall as a burden upon the community; to become a pauper." See also Greenhood on Public Policy, p. 685; Pollock on Contracts (2d Am. Ed.), p. 312; Spelling on Trusts and Monopolies, § 3; Beal v. Chase, note 2, supra; Bingham v. Maigne, 52 N. Y. Super. 90 (1885); Long v. Towl, 42 Mo. 545; 97 Am. Dec. 355 (1868); Skrainka v. Scharringhausen, 8 Mo. App. 522 (1880). In Lawrence v. Kidder, supra, was suggested as an additional and distinct reason for the rule, the desirability that "all the various trades and employments of society should be pursued each in its due proportion." S. P., Harri-

son v. Lockhart, 25 Ind. 112 (1865). In Mitchel v. Reynolds, 1 P. Wms. 181, 190 (1711), it was stated as the true reasons of the doctrine "the mischief which may arise to the party by the loss of his livelihood and the subsistence of his family; to the public by depriving it of a useful member." See also, Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64; 22 L. Ed. 315 (1873); Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 409; 9 Supm. 553, 557; 32 L. Ed. 979 (1889); Union Strawboard Co. v. Bonfield, 193 Ill. 420; 61 N. E. 1038; 86 Am. St. Rep. 346 (1901); Alger v. Thacher, 19 Pick. (Mass.) 51; 31 Am. Dec. 119 (1837); Newell v. Meyendorff, 9 Mont. 254; 23 Pac. 333; 8 L. R. A. 440; 18 Am. St. Rep. 738 (1890); Downing v. Lewis, 59 Neb. 38; 80 N. W. 261 (1899); Tecktonius v. Scott, 110 Wis. 441; 86 N. W. 672 (1901).

⁴ See 24 Am. & Eng. Enc. of Law, 2d ed., p. 842.

⁵ See 24 Am. & Eng. Enc. of Law, 2d ed., p. 845.

⁶ Id.

In its original form the doctrine condemned any agreement in restraint of trade without any reference to the character of any limitation as to time or space.⁷ For some two centuries the doctrine seems to have thus stood without modification. Afterwards it was modified by allowing an exception of contracts containing limitations as to space; in other words, *partial* restraints.⁸ At last, in the present century, more than five centuries after the introduction of the doctrine, the test of limitation as to space has been generally abandoned, and the simple test of *reasonableness*, without reference to limitations as to time and space, adopted.⁹ Such a contract has frequently appeared as an incident to a contract of sale of a business or of property connected therewith, the seller agreeing not to engage in business of that or a similar character,¹⁰ so frequently as an

⁷ In *Colgate v. Bacher*, 3 Cro. Eliz. 872 (1602), an agreement not to use the trade of haberdasher "within the county of Kent, the cities of Canterbury or Rochester" was held bad, the court saying: "This condition is against law, to prohibit or restrain any to use a lawful trade *at any time or at any place*." It seems to have long been established that a contract in restraint of trade may be sustained, though without limit as to time. See 24 Am. & Eng. Enc. of Law, 2d ed., p. 847.

⁸ *Rogers v. Parrey*, Bulstrode, 136 (1613), is said in *Spelling on Trusts and Monopolies*, § 5, to be the first case that recognized the validity of a contract containing such limitations. But since *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711), their validity has been well established. Here was sustained an agreement by the lessor of a bakehouse not to exercise the trade of baker within a certain parish for five years. See also 24 Am. & Eng. Enc. of Law, 2d ed., p. 843.

⁹ Thus, in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, App. Cas. 1894 (535), a contract was sustained as reasonable and valid *without limit as to space*. Compare *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680; 39 Atl. 923 (1898); reversed in 58 N. J. Eq. 507; 43 Atl. 723; 46 L. R. A. 255; 78 Am. St. Rep. 612 (1899). See 24 Am. & Eng. Enc. of Law, 2d ed., p. 850. In Michigan there is a curious prohibition (see § 217 of such contracts "*whether reasonable or unreasonable, partial or general, limited or unlimited*." But the ordinary contracts incident to the sale of a business are excepted.

¹⁰ For numerous instances see article on "Restraint of Trade," 24 Am. & Eng. Enc. of Law, 2d ed., p. 841; see also Cal. Civ. Code, §§ 1674, 1675, which have in several instances been copied elsewhere. Whether such a contract would be sustainable as an independent contract, see 24 Am. & Eng. Enc. of Law, 2d ed., p. 851; also article in 35 Am. Law Rev. 836 (1901).

incident to a contract of employment, the employee agreeing not to engage after the expiration of his term of employment in business of that or a similar character.¹¹

§ 160. **Prevention of restriction upon competition, not basis of doctrine.**—Not only is the basis of the doctrine against contracts in restraint of trade clearly as above stated, but it seems equally clear that the doctrine, in its origin, had no reference whatever to the evils produced by a monopoly or other restriction upon competition.¹² Nevertheless the view has been fre-

In *Wayne Monroe Tel. Co. v. Ontario Tel. Co.*, 112 N. Y. Suppl. 424 (Supm. Ct., Sp. T., 1908), the rule sustaining contracts in restraint of trade was applied in sustaining a provision in an agreement between telephone companies in restriction upon competition, as "only incidental and contributory to the attainment of the main object of the agreement, an extension of the business of each party through the connection of their two systems."

¹¹ For numerous instances see article on "Restraint of Trade," 24 Am. & Eng. Enc. of Law, 2d ed., p. 841.

¹² See dissenting opinion of Holmes, J., in *Northern Securities Co. v. U. S.*, 193 U. S. 197, 404; 24 Supm. 436, 469; 48 L. Ed. 679 (1904). It was indeed intimated in *Mitchel v. Reynolds* as an *additional* reason for the rule, "the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for *exclusive advantages in trade and to reduce it into as few hands as possible*." But this remark was made without apparent consideration, and seems entitled to little weight, coming after the doctrine had been established in England for three centuries. Such

remark is the starting point of the view expressed in subsequent cases, that the prevention of monopolies is an additional ground for the doctrine. Thus, in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 279; 29 C. C. A. 141, 149; 46 L. R. A. 122, 129 (6th C., 1898); *Talcott v. Brackett*, 5 Ill. App. 60, 67 (1879); *Chapin v. Brown*, 83 Iowa, 156; 48 N. W. 1074; 12 L. R. A. 428; 32 Am. St. Rep. 297 (1891); *Alger v. Thacher*, 19 Pick. (Mass.) 51; 31 Am. Dec. 119 (1837); *Taylor v. Blanchard*, 13 Allen (Mass.), 370; 90 Am. Dec. 203 (1866); *Bishop v. Palmer*, 146 Mass. 469; 16 N. E. 299; 4 Am. St. Rep. 339 (1888); *Clark v. Needham*, 125 Mich. 84; 83 N. W. 1027; 51 L. R. A. 785; 84 Am. St. Rep. 559 (1900); *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (1880); *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 76; 71 S. W. 691, 695 (1902); *Newell v. Meyendorff*, 9 Mont. 254; 23 Pac. 333; 8 L. R. A. 440; 18 Am. St. Rep. 738 (1890); *Eastern Express Co. v. Meserve*, 60 N. H. 198 (1880); *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508; 56 S. E. 264; 10 L. R. A. N. S. 268; 116 Am. St. Rep. 901 (1907); *Milwaukee Masons & Builders' Assoc. v. Nize-*

quently expressed or acted upon that the doctrine against restrictions upon competition is based on that against contracts in restraint of trade.¹³ This misapprehension is comparatively harmless where the same result would be reached whichever

rowski, 95 Wis. 129; 70 N. W. 166; 37 L. R. A. 127; 60 Am. St. Rep. 97 (1897); *Tecktonius v. Scott*, 110 Wis. 441; 86 N. W. 672 (1901). In *U. S. Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946 (C. C. Mo., 1894), it was even said that "the substantial ground in all cases, especially where corporations are concerned, is that such contracts tend to create monopolies." Compare *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596; 49 N. E. 1030; 41 L. R. A. 185; 63 Am. St. Rep. 736 (1898).

¹³ Thus, in *National Harrow Co. v. Hench*, 83 Fed. 36; 27 C. C. A. 349; 39 L. R. A. 299 (3d C., 1897); *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 291; 29 C. C. A. 141, 161; 46 L. R. A. 122, 136 (6th C., 1898; a conspicuous illustration, in view of the elaborate discussion of authorities); *State v. Central of Georgia Ry. Co.*, 109 Ga. 716, 722, 726; 35 S. E. 37, 38, 40; 48 L. R. A. 351, 353, 355 (1900); *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 434; 41 S. E. 553, 555; 57 L. R. A. 547, 550; 90 Am. St. Rep. 126 (1902); *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171 (1875); *More v. Bennett*, 140 Ill. 69; 29 N. E. 888; 15 L. R. A. 361; 33 Am. St. Rep. 216 (1892); *State v. Smiley*, 65 Kan. 240, 257; 69 Pac. 199, 205; 67 L. R. A. 903, 911 (1902); *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906); *State ex inf. Crow v. Firemen's Fund Ins. Co.*,

152 Mo. 1, 41, 42; 52 S. W. 595, 606, 607; 45 L. R. A. 363, 375 (1899); *Finck v. Schneider Granite Co.*, 187 Mo. 244, 268; 86 S. W. 213, 220; 106 Am. St. Rep. 452 (1905); *Strait v. National Harrow Co.*, 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T. 1891); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 184; 8 Am. Rep. 159, 163 (1871); *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288, 300; 59 Atl. 1088, 1092; 105 Am. St. Rep. 812 (1904); *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642; 47 S. E. 247; 65 L. R. A. 342; 104 Am. St. Rep. 1013 (1904). See also *Milwaukee Masons & Builders' Assoc. v. Niezerowski*, 95 Wis. 129; 70 N. W. 166; 37 L. R. A. 127; 60 Am. St. Rep. 97 (1897); *Urmston v. Whitelegg*, 63 L. T. R. (N. S.) 455 (1890); *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 643; 14 C. C. A. 14, 20 (2d C., 1895), and cases cited infra.

In *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401; 58 N. E. 525; 52 L. R. A. 262; 79 Am. St. Rep. 655 (1900), where an agreement was held illegal according to the doctrine against restrictions upon competition, cases of a vendor agreeing not to engage in the same business were distinguished as cases of contracts "not in general restraint of trade." On the other hand, the distinction between these doctrines

doctrine be applied. But it is otherwise where a transaction that should be held illegal according to the doctrine against restrictions upon competition, is upheld by applying that against contracts in restraint of trade.¹⁴ A further serious result of

has been apprehended by some courts. Thus, in *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272; 47 N. W. 806; 11 L. R. A. 437 (1891), where a contract between two corporations was sustained as not illegal as *in restraint of trade*, the court said: "Neither one nor both of these companies have any exclusive right to engage in this business, it being one open to all. Hence this contract does not and cannot create any *monopoly*. The most that can be claimed against it is that it reduces by one the number of competitors." So, in *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 483; 13 N. E. 419, 422; 60 Am. Rep. 464, 469 (1887), it was said: "To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with

the covenantee." To similar effect, *Excelsior Quilting Co. v. Creter*, 36 Misc. 698; 74 N. Y. Suppl. 361 (Supm. Ct., Sp. T., 1902). See also *National Enameling Co. v. Haberman*, 120 Fed. 415, 421 (C. C. Conn., 1903). Compare *Barber Asphalt Paving Co. v. Brand*, 7 N. Y. Suppl. 744 (Supm. Ct., Gen. T., 1889). See, as to application to "trusts," of rules governing contracts in restraint of trade, articles in 4 Harv. Law Rev. 128 (1890) by A. M. Eaton; 13 Id., 198, 265, 273 (1899-1900) by E. Q. Keasbey; 21 Id. 167 (1907) by Herbert Pope; 2 *Eddy on Combinations*, §§ 657, 719. For an expression of view similar to that stated in the text, see Noyes on *Intercompany Relations*, 2d ed., c. 33.

¹⁴In *Leslie v. Lorillard*, 110 N. Y. 519, 534; 18 N. E. 363, 366; 1 L. R. A. 456, 461 (1888), an agreement between two rival steamboat companies by which one discontinued business, was sustained. It would seem from the statement of facts that the agreement was between the only two steamboat companies running between New York and certain ports in Virginia. The agreement seems to have resulted in a practical monopoly, and it seems difficult to sustain the decision, in view of later ones, even in New York. See comments on this decision in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 285; 29 C. C. A. 141, 155; 46 L. R. A. 122, 133 (6th C., 1898). The court (in *Leslie v. Lorillard*) asked:

the failure to observe the distinction is seen in statutory prohibitions intended to include restrictions upon competition merely, but actually including such contracts in restraint of trade as in no sense constitute restrictions upon competition.¹⁵

§ 161. **Inapplicability of test of space limit to restrictions upon competition.**—That the prevention of restrictions upon competition is not the basis of the doctrine against contracts in restraint of trade conspicuously appears from the

“How is the result different from the simpler case of the sale by an individual of his business and his right to conduct it in a particular part of the land?” The answer, of course, is that in the case supposed the agreement does not, necessarily at least, result in an appreciable restriction upon competition, at any rate, not in a monopoly. This decision is the more surprising in view of the circumstance that in *Diamond Match Co. v. Roeber*, 106 N. Y. 473; 13 N. E. 419; 60 Am. Rep. 464 (1887), the same court had so clearly recognized the distinction between the doctrines. So, in *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. 553 (C. C. N. Y., 1886), an agreement between two manufacturers of washing-machines, they being the principal, but not the only, manufacturers in this country, for a division of profits on sales, upon the basis of a fixed price, was held not illegal. In *Master Stevedores' Assoc. v. Walsh*, 2 Daly (N. Y.), 1, 14 (1867), was sustained a by-law of an association of master stevedores, providing for *fixing prices* for which members should work. The question whether this was void as tending to prevent competition, was not discussed beyond a statement that the by-law was “not in restraint of trade, for it imposes no restraint upon one

party which is not beneficial to the others, and is not prejudicial to the interests of the public.” To what extent the members of the association controlled the business in the locality of their operations does not, however, appear.

¹⁵ Thus, so far as the Federal anti-trust act has had any effect, it has, as a rule, been with reference, not to “trusts,” or other mere restrictions upon competition, but to contracts in restraint of “trade” or “commerce.” See in the different anti-trust acts, prohibitions against combinations to “create or carry out restrictions in trade”; combinations, etc., “in restraint of trade,” and the like. As to application of such provisions to ordinary contract of vendor not to engage in business, see under Federal act (§ 192); also under Minn. (§ 218); Neb. (§ 222); Tex. (§ 232). Compare under Ill. (§ 209); Mich. (§ 217). As to application of such provisions to restrictions upon use of property, see under Neb. (§ 222). See under Federal act (§ 194); also under Tex. (§ 232), as to whether such prohibitions include reasonable restrictions. See article in 33 Am. Law Rev. 63 (1899), on “Anti-trust Legislation and the Doctrine against Contracts in Restraint of Trade.”

inapplicability of the test of space limit to restrictions upon competition.¹⁶ Thus, at least until very recently, the doctrine would have been applied so as to hold illegal the withdrawal (without limit as to space) of one out of a thousand trade competitors in a given city, notwithstanding that the continuance of the other nine hundred and ninety-nine would have effectually prevented the danger of monopoly. On the other hand, it would (as modified with reference to space) have been commonly applied to hold legal the withdrawal of nine hundred and ninety-nine such competitors from carrying on their trade within a given city;¹⁷ while such withdrawal, though valid under the technical doctrine as to space limit, would be

¹⁶ The total inapplicability of the test of space limit to restrictions upon competition, was clearly seen in *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; 29 Atl. 102; 24 L. R. A. 247; 41 Am. St. Rep. 894 (1894), where a combination to prevent competition within the city of Philadelphia and the county of Camden, N. J., was held illegal, against the objection that the restraint was but partial. The court said: "It is obviously immaterial whether the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, nor the extent of space included, in the combination; but upon the existence of injury to the public. One combination consisting of but part of those engaged in a given branch of trade, may amount to a practical monopoly; while another, less extensive in its scope, may, as well, bring disaster in its train. The difference lies only in degree, but equally forbids the aid of courts." In *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19, 26

(Supm. Ct. Fla., 1908), where the restriction was in the business of keeping a general store in a village (see § 173), it was said: "Where an agreement in operation has a necessary tendency to restrain trade or to monopoly to the appreciable injury of the public, limitations as to time, place, or subjects contained in the agreement are immaterial." In *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 237; 20 Supm. 96, 106; 44 L. Ed. 136 (1899), the restriction in question was held illegal, though its operation "did not cover the United States." Similarly the test of space limit was rejected in *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 660; 19 S. W. 274, 278; 15 L. R. A. 598, 602; 29 Am. St. Rep. 690, 700 (1892); *Bailey v. Master Plumbers*, 103 Tenn. 99, 114; 52 S. W. 853, 856; 46 L. R. A. 561, 565 (1899); *Chicago, Wilmington, etc., Coal Co. v. People*, 114 Ill. App. 75, 113, 115 (1904).

¹⁷ See, for instance, *Kellogg v. Larkin*, *infra*, and cases cited in *Greenhood on Public Policy*, p. 709.

contrary to the present doctrine against restrictions upon competition.¹⁸

¹⁸ In *Tuscaloosa Ice Manuf. Co. v. Williams*, 127 Ala. 110; 28 So. 669; 50 L. R. A. 175; 85 Am. St. Rep. 125 (1900), an agreement in restriction upon competition was held invalid though confined in its operation to a region of 7,000 inhabitants. This was, however, on the ground that the agreement, regarded as a contract in restraint of trade, was thus not incident to the purchase of any business or plant. But the following are instances of acts held legal, where the court might have decided them to be illegal as creating restrictions upon competition, had it not been for the confusion of thought produced by applying the test of space limit. In *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 527 (1880), an agreement among twenty-four proprietors of stone-quarries in a portion of St. Louis, providing for the sale of all the rubble building-stone of such quarries by a common agent for a period of six months at prices fixed by the agreement, was sustained. By its terms the agreement was designed to prevent the depression of prices resulting from competition, making it impossible to work quarries at a profit. The court said: "The partial nature of the restraint in the case before us seems to be not colorable, but real. The agreement is amongst the quarrymen of one district of one city, and it does not appear that it embraces all of them. . . . *It is limited both as to time and place*; and we know of no case in recent times in which a contract such as the one before us has been declared illegal." So in *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549; 41 Pac.

495; 29 L. R. A. 839 (1895), a contract restraining competition in the business of supplying water to a city was held valid, as only partial, being confined to such city. In *Downing v. Lewis*, 59 Neb. 38; 80 N. W. 261 (1899), the contract sustained as valid was between the proprietors of the only two laundries in a given city. A striking instance to similar effect is *Kellogg v. Larkin*, 3 Pinney (Wis.), 123, 142; 56 Am. Dec. 164, 173 (1851), where recovery was allowed on a lease of a warehouse, though, to the knowledge of the plaintiff, executed in furtherance of an agreement between proprietors of six wheat mills on the one hand, and the proprietors of twelve warehouses on the other, whereby the warehousemen were to give the former "full, absolute and uninterrupted control of the Milwaukee wheat market, so far as they shall be able to do so by virtue of their capacity as warehousemen or vessel and dock owners." The court said: "The restraint it imposed upon trade, if any, was partial and limited; limited in every particular referred to in the books. It was limited as to persons, as to object, as to place and as to time (though this last is not essential). As to persons, it was limited to the proprietors of eleven (twelve) warehouses; as to object it was limited to the traffic in wheat; as to place, it was limited to the Milwaukee market; and as to time, to a period of about seven months." Compare *Herriman v. Menzies*, 115 Cal. 16; 46 Pac. 730; 35 L. R. A. 318; 56 Am. St. Rep. 82 (1896).

CHAPTER XVII

REMEDIES

- § 162. Acts illegal as against public policy and criminal acts.
- 163. Criminal liability.
- 164. Civil liability.
- 165. Proceeding on behalf of public.
- 166. Injunction in proceeding on behalf of public.
- 167. Non-enforceability of agreement.
- 168. Injury to party to restriction.
- 169. Agreement not related to restriction.
- 170. Non-enforceability of agreement because of relation to restriction.
- 171. Remedies by or against agent.
- 172. Agreement of sale.
- 173. Contract in restraint of trade.
- 174. Disaffirmance of agreement.
- 175. Corporate acts.
- 176. Relief to stockholder.
- 177. Dissolution or ouster of corporation.

§ 162. Acts illegal as against public policy and criminal acts.

—In the view we have taken, an act illegal as against public policy involves the idea of a wrong committed against a considerable number of persons, vaguely designated as “the public.”¹ The same may be said of an act illegal as a criminal act.² But not all acts illegal as against public policy are criminal. The precise line of distinction may not be easy to draw; the distinction seems to be one of degree rather than of kind. The border territory of doubtful cases includes, to some extent at least, acts illegal as producing or tending to produce restrictions upon competition.

§ 163. **Criminal liability.**—It seems clear that not all acts in restriction upon competition are criminal; and, indeed, the question of criminality has been raised only as to such acts as

¹ See § 106.

² See 1 Bishop's New Criminal Law, §§ 231, 232.

come under the description of forestalling, engrossing and regrating, which were for centuries statutory offenses in England, a decision of the question whether they were criminal acts at common law being thus precluded.³ In this country there seems to have been no serious attempt to enforce on common-law grounds any criminal liability for acts producing or tending to produce restrictions upon competition, though the opinion has frequently been expressed that such a liability exists.⁴ Another source of such opinion seems to be the exploded doctrine, elsewhere considered, of a criminal liability for com-

³ Though the question was not in the case, it seems to have been the view of the court in *Mogul S. S. Co. v. McGregor*, App. Cas. (1892), 25, 46, 58, that what were here called agreements "in restraint of trade" were not indictable at common law, questioning remarks of Crompton, J., in *Hilton v. Eckersley*, 6 El. & Bl. 47 (1855). Of forestalling, engrossing and regrating it is said in 1 Bishop's New Criminal Law, § 518: "These are kindred offenses, indictable both under the ancient common law and by early English statutes, yet seldom made the subject of a criminal prosecution in modern times. And in England they were abolished in 1844, by 7 & 8 Vict., c. 24, both as common-law offenses and as statutory." The statutes against these offenses had been repealed by 12 Geo. 3, c. 71 (1772), but, according to *Rex v. Rusby*, Peake's Additional Nisi Prius Cases, 189 (1800); *Rex v. Waddington*, 1 East, 143 (1800), they continued as common-law offenses. See also 2 Wharton's Criminal Law (10th ed.), §§ 1849-51. For an extended discussion of the statute, 5 & 6 Edw. 6, c. 14, see Eddy on Combinations, §§ 40-52. In *Ontario Salt Co. v. Merchants'*

Salt Co., 18 Grant (Ontario), 540 (1871), an agreement among manufacturers of salt was held not illegal on the ground that its object was to raise the price, but the view was taken that, even if such acts were once illegal at common law, "long usage" has brought about a change in the common law in this respect. See Story on Sales (4th ed.), § 490; also article in 7 Harv. Law Rev. 338 (1894) by W. F. Dana, where it is said that "at common law there was no such offense as 'monopolizing'" (p. 342), and it is denied (p. 345) that "engrossing" at common law had any relation to "monopolizing."

⁴ See, for instance, *Raymond v. Leavitt*, 46 Mich. 447; 41 Am. Rep. 170 (1881); *Cummings v. Foss*, 40 Ill. App. 523 (1891); affirmed in *Foss v. Cummings*, 149 Ill. 353; 36 N. E. 553 (1894); *Strait v. National Harrow Co.*, 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891); *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L. R. A. N. S. 976; 118 Am. St. Rep. 399 (1906); *Hammond Packing Co. v. State*, 81 Ark. 519; 100 S. W. 407, 1199 (1907). These were all proceedings to enforce a civil liability. It is said in 1 Bishop's New Crim-

binations to raise wages.⁵ Criminal liability for acts producing or tending to produce restrictions upon competition, now very generally exists in this country by virtue of statute.⁶

§ 164. **Civil liability.**—Leaving out of consideration remedies as between parties to an agreement in restriction upon competition, it seems to have been the strict rule of the common law that no civil liability results merely from the existence of such a restriction.⁷ The reason of this rule

inal Law, § 520: "It is reasonably plain that the common law of our States has not adopted these offenses in terms as thus defined. Yet it does not follow that the principle from which the law proceeded has not become an inheritance with us. Modified, therefore, and thus adapted to our altered situation and circumstances, there is ground for deeming them criminal misdemeanors in States that recognize common-law crimes." Otherwise, of course, where common-law crimes are not recognized. See *State ex rel. Monnett v. Buckeye Pipe Line Co.*, 61 Ohio St. 520; 56 N. E. 464 (1900). See the elaborate discussion in Stickney's "State Control of Trade and Commerce." In 2 Wharton's *Precedents*, No. 658, is a case of an indictment for a conspiracy among carriers to regulate the prices of transportation, sustained by Judge Grier, afterwards of the United States Supreme Court.

As to sufficiency of information on prosecution for conspiracy in restraint of trade, see *State v. Dreany*, 65 Kan. 292; 69 Pac. 182 (1902).

In *Ætna Ins. Co. v. Commonwealth*, 106 Ky. 864; 51 S. W. 624; 45 L. R. A. 355 (1899), where the authorities were elaborately reviewed, it was held not an indictable offense at common law to combine

for the purpose of maintaining rates of insurance.

⁵ See, for instance, *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 187; 8 Am. Rep. 159, 166 (1871). In *Chicago, Wilmington, etc., Coal Co. v. People*, 214 Ill. 421; 73 N. E. 770 (1905), where was sustained a conviction for a conspiracy in restriction upon competition, common-law grounds were regarded as sufficient, though the indictment also contained counts framed under statutes. The common law on this subject was held not repealed by statute. See also *Sanford v. People*, 121 Ill. App. 619 (1905).

⁶ See under the various anti-trust acts, cc. XIX, XX.

⁷ *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 617; 40 S. E. 591, 593; 56 L. R. A. 804, 808; 88 Am. St. Rep. 895 (1902). See *Olmstead v. Distilling & Cattle-Feeding Co.*, 77 Fed. 265 (C. C. Ill., 1896). So held that no action would lie against the members of a combination illegal as in restriction upon competition, for a refusal to sell to the plaintiff. *Brewster v. Miller*, 101 Ky. 368; 41 S. W. 301; 38 L. R. A. 505 (1897). Analogous are the decisions to the effect that a contract in restraint of trade is not actionable at the instance of third parties; thus,

is that while it is true that an injury is regarded as resulting to a large number of persons vaguely designated as "the public," nevertheless, the injury to any given individual is comparatively insignificant, and great inconven-

Bohn Manuf. Co. v. Hollis, 54 Minn. 223, 234; 55 N. W. 1119, 1121; 21 L. R. A. 337, 339; 40 Am. St. Rep. 319 (1893), where the court said: "The courts sometimes call such contracts 'unlawful' or 'illegal,' but in every instance it will be found that these terms were used in the sense merely of 'void' or 'unenforceable' as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public." See also remarks of Lord Watson in Mogul S. S. Co. v. McGregor, App. Cas. (1892) 25, 42; also Continental Ins. Co. v. Board of Underwriters, 67 Fed. 310, 318 (C. C. Cal., 1895); Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co., 3 Misc. 582; 24 N. Y. Suppl. 647 (Supm. Ct., Sp. T., 1893); U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271, 279; 29 C. C. A. 141, 148; 46 L. R. A. 122, 128 (6th C., 1898); Tanenbaum v. N. Y. Fire Ins. Exchange, 33 Misc. 134; 68 N. Y. Suppl. 342 (Supm. Ct., Sp. T., 1900); Park v. National Wholesale Druggists' Assoc., 54 App. D. 223; 66 N. Y. Suppl. 615 (1900); Walsh v. Dwight, 40 App. D. 513; 58 N. Y. Suppl. 91 (1899); State ex rel. Monnett v. Buckeye Pipe Line Co., 61 Ohio St. 520; 56 N. E. 464 (1900). See also, article in 19 Law Quart. Rev. 37, 182 (1903) by D. R. Chalmers Hunt. In Dittman v. Distilling Co. of America, 64 N. J. Eq. 537, 544; 54 Atl. 570, 572 (1903), where a stockholder was denied equitable relief against the

transfer of a controlling interest in the stock of the corporation to another corporation, such relief being sought on the ground that the organization of the latter corporation and such transfer of stock involved the creation of an illegal restriction upon competition, it would seem that the decision might well have rested on the doctrine stated in the text, and that it was unnecessarily based on the doctrine involved in Stockton v. American Tobacco Co., 55 N. J. Eq. 352; 36 Atl. 971 (1897). See § 150. In Bigelow v. Calumet & Hecla Mining Co., 155 Fed. 869, 880 (C. C. Mich., 1907), relief was allowed a stockholder under like conditions, he being regarded as having suffered injury "distinct from such as would be suffered by the general public."

Nor, though an act is by statute declared a crime, is any private action therefor thereby created. Downes v. Bennett, 63 Kan. 653; 66 Pac. 623; 55 L. R. A. 560; 88 Am. St. Rep. 256 (1901). To the contrary, however, seems Rourke v. Elk Drug Co., 75 App. D. 145; 77 N. Y. Suppl. 373 (1902); and see Kellogg v. Sowerby, note 9, *infra*.

The distinction between mere acts in restriction upon competition, resulting in no civil liability, and acts resulting in such liability, was considered in Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 438; 41 S. E. 553, 557; 57 L. R. A. 547, 552; 90 Am. St. Rep. 126 (1902), where, however, the acts held illegal constituted a boycott. See § 34.

ience would result from the recognition of a remedy in favor of each one of so large a number. Thus it has been said: "It would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects."⁸ There seems manifest, however, a strong disposition to relax the strictness of this rule,⁹ and in the anti-trust acts a right of action is commonly

⁸ 4 Blackstone's Commentaries, p. 167.

⁹ It seems to have been overlooked or ignored in *Gatzow v. Buening*, 106 Wis. 1, 13; 81 N. W. 1003, 1006; 49 L. R. A. 475, 480; 80 Am. St. Rep. 17 (1900). See, however, *State ex rel. Durner v. Huegin*, 110 Wis. 189, 253; 85 N. W. 1046, 1063; 62 L. R. A. 700, 742 (1901). It seems also to have been overlooked or ignored in *Liverpool & London & Globe Ins. Co. v. Clunie*, 88 Fed. 160, 177 (C. C. Cal., 1898), where the decision in *Continental Ins. Co. v. Board of Underwriters*, 67 Fed. 310 (C. C. Cal., 1895), was regarded as authority for the proposition that the combination there under consideration was not illegal as in restriction upon competition; it is, however, simply authority for the proposition that, in the case under consideration, no civil liability resulted from the existence of such combination. It may also have been overlooked or ignored in the elaborate dissenting opinion in *Straus v. American Publishers' Assoc.*, 177 N. Y. 473; 69 N. E. 1107; 64 L. R. A. 701; 101 Am. St. Rep. 819 (1904); and see dissenting opinion in *Park v. National Wholesale Druggists' Assoc.*, 175 N. Y. 1; 67 N. E. 136; 62 L. R. A. 632; 96 Am. St. Rep. 578 (1903). See also *Klingel's Pharmacy v. Sharpe*, 104 Md. 218; 64 Atl. 1029; 7 L.

R. A. N. S. 976; 118 Am. St. Rep. 399 (1906).

In *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509; 50 S. E. 353; 69 L. R. A. 90; 106 Am. St. Rep. 137 (1905), where was allowed an injunction against acts of a combination of trade competitors, although the right to relief was largely based on their influencing labor organizations to obstruct plaintiff's business, such right was based in part on the circumstance that such competitors had entered into a combination "to create a monopoly and stifle competition"; that is, by a conspiracy to fix and control the price of printing. The right to relief was held not barred by the circumstance of the plaintiff having been a party to such combination, membership in which it had, however, repudiated before commencement of the suit. See also 2 *Eddy on Combinations*, §§ 1048, 1049, 1055. In *Leonard v. Abner-Drury Brewing Co.*, 25 App. D. C. 161 (1905), was allowed equitable relief against "the execution of the objects of" what was declared to be a conspiracy in restraint of trade, said to be illegal under § 3 of the Federal anti-trust act, but "equally violative of the common law" which prevails in the District of Columbia," § 3 being merely declaratory thereof. The injury against which relief was allowed seems to have

given to one damaged by an act in restriction upon competition.¹⁰

§ 165. **Proceeding on behalf of public.**—In accordance with the general doctrine allowing, on behalf of the public, a remedy against an act producing injury to the public, as in case of what is known as a public nuisance,¹¹ it would seem to follow that a proceeding may be maintained on behalf of the public for relief against a restriction upon competition. The attorney-general is the proper officer to institute such a proceeding.

§ 166. **Injunction in proceeding on behalf of public.**—Rarely, if ever, is an action at law for damages an adequate remedy to

been in effect a mere inducing of refusal to deal, the combination being among brewers who sought to coerce another brewer to join the combination. The complaint was of injury that would result to retail dealers from the termination of their established trade relations with the brewer thus sought to be forced into the combination.

In *Kellogg v. Sowerby*, 190 N. Y. 370; 83 N. E. 47 (1907); reversing 93 App. D. 124; 87 N. Y. Suppl. 412 (1904), was sustained civil liability for conspiracy to prevent from competing with others engaged in the same kind of business, such conspiracy being declared to be within the prohibition of the statute imposing criminal liability for conspiracy "to commit any act injurious to trade or commerce."

¹⁰ See cc. XIX, XX. In some instances twofold or threefold damages are allowed. So the remedy by injunction is sometimes provided for in such acts. See *Currier v. Concord R. R. Co.*, 48 N. H. 321 (1869), as to relief in equity to an individual under the New Hampshire statute against railroad monopolies. As to Federal act allowing right of action for damage or

loss that 'would not have been actionable at common law,' see § 203.

¹¹ As to the remedy in case of a public nuisance, see 1 High on Injunctions (3d ed.), §§ 759-771. But the existence of such remedy was denied in *McCarter (Attorney General) v. Firemen's Ins. Co.*, 70 N. J. Eq. 291; 61 Atl. 705 (1905), holding not maintainable a proceeding by the attorney-general to enjoin certain corporations from regulating and maintaining rates of premium for insurance. Reliance was had on the general rule that a contract in restraint of trade is not "illegal in the ordinary sense of the word, but merely as being unenforceable." But this conclusion seems a result of the frequent error elsewhere considered (§ 160), of confusing the doctrine against restrictions upon competition with that against contracts in restraint of trade. Such a proceeding was, however, held maintainable under like conditions in *People v. Aachen & Munich Fire Ins. Co.*, 126 Ill. App. 636 (1906). See under Okla. (§ 228) as to application of statute allowing injunction against "a common nuisance."

the public against acts in restriction upon competition, and, in accordance with the rules applicable to the granting of injunctions, an injunction on the application of the attorney-general is ordinarily the proper proceeding. Although there appears to be in the nature of things no reason why such relief should not be granted against acts of a mere individual, in practice it is only acts of a corporation against which such relief seems ever to have been sought.¹²

§ 167. **Non-enforcibility of agreement.**—The remedy by injunction just considered is available against a corporation or a mere individual, independently of whether the restriction is the result of an agreement. But such restrictions are commonly the result of agreement, and the existence of such an agreement gives rise to the question of the existence of remedies as between the parties thereto.¹³ In accordance with the doctrine applicable generally to agreements illegal as against public policy, no proceeding, whether legal or equitable, can be maintained, as between such parties, to enforce any provision of the agreement.¹⁴

¹² See § 175; article in 16 Harv. Law Rev. 389 (1902-3) by E. S. Mack.

¹³ Of course such questions do not arise in case of a restriction resulting solely from the action of an individual, as distinguished from a combination. See *Oliver v. Gilmore*, 52 Fed. 562 (C. C. Mass., 1892).

¹⁴ *Bement v. National Harrow Co.*, 186 U. S. 70, 88; 22 Supm. 747, 754; 46 L. Ed. 1058 (1902; agreement in violation of Federal anti-trust act); *Burlington, C. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 652 (C. C. Minn., 1887); *National Harrow Co. v. Hench*, 76 Fed. 667 (C. C. Pa., 1896); *Cravens v. Carter-Crume Co.*, 92 Fed. 479; 34 C. C. A. 479 (6th C., 1899); *Indiana Manuf. Co.*

v. J. I. Case Threshing Mach. Co., 148 Fed. 21 (C. C. Wis., 1906); *McConnell v. Camors-McConnell Co.*, 152 Fed. 321; 81 C. C. A. 429 (5th C., 1907); *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19 (Supm. Ct. Fla., 1908); *More v. Bennett*, 140 Ill. 69; 29 N. E. 888; 15 L. R. A. 361; 33 Am. St. Rep. 216 (1892); *Keene Syndicate v. Wichita Gas, Electric Light & Power Co.*, 69 Kan. 284; 76 Pac. 834; 67 L. R. A. 61; 105 Am. St. Rep. 164 (1904); *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36; 42 N. W. 532; 4 L. R. A. 373; 13 Am. St. Rep. 420 (1889; covenant in deed against sale of liquor); *Richardson v. Buhl*, 77 Mich. 632, 651; 43 N. W. 1102, 1108; 6 L. R. A. 457, 464 (1889; action for amount claimed to be

§ 168. Injury to party to restriction.—The circumstance

due under an agreement among stockholders for winding up the business of a corporation, for the purpose of uniting it with other interests); *Judd v. Harrington*, 139 N. Y. 105; 34 N. E. 790 (1893); *Cohen v. Berlin & Jones Envelope Co.*, 166 N. Y. 292, 299; 59 N. E. 906, 908 (1901); *Hartford & New Haven R. R. Co. v. N. Y. & New Haven R. R. Co.*, 3 Robt. (N. Y.) 411 (1865); *National Harrow Co. v. Bement*, 21 App. D. 290, 297; 47 N. Y. Suppl. 462, 468 (1897); *Coverly v. Terminal Warehouse Co.*, 85 App. D. 488; 83 N. Y. Suppl. 369 (1903); affirmed in 178 N. Y. 602; 70 N. E. 1097 (1904); *Culp v. Love*, 127 N. C. 457; 37 S. E. 476 (1900); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880); *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120; 47 S. W. 288 (1898); *Hartford Fire Ins. Co. v. City of Houston*, 110 S. W. 973 (Tex. Civ. App., 1908); *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642; 47 S. E. 247; 65 L. R. A. 342; 104 Am. St. Rep. 1013 (1904); *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22; 50 S. E. 876; 112 Am. St. Rep. 936 (1905); *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 520; 56 S. E. 264, 269; 10 L. R. A. N. S. 268, 280; 116 Am. St. Rep. 901 (1907); *Urmston v. Whitelegg*, 63 L. T. R. (N. S.) 455 (1890). As to enforceability of judgment based on claim illegal as in restriction upon competition, see *Perry v. U. S. School Furniture Co.*, 232 Ill. 101; 82 N. E. 444 (1907).

Thus, recovery for profits or earnings claimed to be due, was refused in *Vulcan Powder Co. v. Hercules*

Powder Co., 96 Cal. 510; 31 Pac. 581; 31 Am. St. Rep. 242 (1892); *Meyers v. Merillion*, 118 Cal. 352; 50 Pac. 662 (1897); *Craft v. McCoughy*, 79 Ill. 346; 22 Am. Rep. 171 (1875); *Texas & Pacific Ry. Co. v. Southern Pacific Ry. Co.*, 41 La. Ann. 970; 6 So. 888; 17 Am. St. Rep. 445 (1889); *Hooker v. Vandewater*, 4 Denio (N. Y.), 349; 47 Am. Dec. 258 (1847); *Stanton v. Allen*, 5 Denio (N. Y.), 434; 49 Am. Dec. 282 (1848); *Gray v. Oxnard*, 59 Hun, 387; 13 N. Y. Suppl. 86 (1891); *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 24 N. E. 660; 21 Am. St. Rep. 819 (1890); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 188; 8 Am. Rep. 159, 168 (1871); *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; 29 Atl. 102; 24 L. R. A. 247; 41 Am. St. Rep. 894 (1894); *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650; 19 S. W. 274; 15 L. R. A. 598; 29 Am. St. Rep. 690 (1892); *Wiggins v. Bisso*, 92 Tex. 219; 47 S. W. 637; 71 Am. St. Rep. 837 (1898); *Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co.*, 61 Fed. 993; 9 C. C. A. 659 (8th C., 1894); see also elaborate discussion in *McMullen v. Hoffman*, 174 U. S. 639; 19 Supm. 839; 43 L. Ed. 1117 (1899).

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Wabash, St. Louis & Pacific Ry. Co.*, supra, the court condemned, as "not supported by the authorities" and as "unsound in principle," *Central Trust Co. v. Ohio Central Ry. Co.*, 23 Fed. 306 (C. C. Ohio, 1885), where recovery was allowed for the amount due under a railroad pooling contract, "without regard to the questions

that one is a party to a restriction upon competition does not remove his person or property beyond the pale of the protection

made as to the original validity of the contract. The court said in *Central Trust Co. v. Ohio Central Ry. Co.*: "The contract itself was a customary one among railroads, and the receiver believed it to be reasonable and fair, and that it was expedient to continue it in force. Good faith requires that the proceeds arising from its operation, and which, by its terms, belong to the petitioner, should be paid over to it." Compare, as to right to share in profits of such a contract, *Cutting v. Florida Ry. & Nav. Co.*, 48 Fed. 508 (C. C. Fla., 1891). The doctrine stated in the text is sometimes declared by statute. C. XX. On the same general ground the right to maintain a proceeding to enforce the provisions of an agreement, was, under varying conditions, denied in the following cases: In *Unckles v. Colgate*, 148 N. Y. 529; 43 N. E. 59 (1896), the holder of a certificate issued by a trust, was not allowed to maintain an action for winding up the affairs of the trust, an accounting by the trustees under the trust agreement, the appointment of a receiver, and the distribution through the receiver of all moneys, and of the proceeds of property, that came into the defendant's hands. Here the plaintiff had purchased the certificates subsequently to the formation of the trust, and it was intimated that his position was less favorable than that of one a stockholder and party to the original agreement. The decision was based on the ground that, having voluntarily made himself a party to a scheme under an executed agree-

ment, which he alleged to be illegal, he could not claim the benefit of such illegal agreement. In *Bailey v. Master Plumbers*, 103 Tenn. 99; 52 S. W. 853; 46 L. R. A. 561 (1899), the agreement held non-enforceable was contained in the by-laws of an association. In *Greer v. Payne*, 4 Kan. App. 153; 46 Pac. 190 (1896), a suit by a member of an unincorporated voluntary association of live-stock dealers, to enjoin the enforcement against him of penalties imposed by the rules of the association, was held not maintainable. This on the ground that the contract of membership was an unlawful combination, under the Kansas statute, and no rights could grow out of it, even membership therein being a misdemeanor. So held, notwithstanding the contention that the granting of the relief would be a virtual wiping out of the illegal by-laws of the association, leaving the exchange, with its members, to conduct their business under valid and lawful rules and regulations. In *Greer v. Stoller*, 77 Fed. 1 (C. C. Mo., 1896), the same result was reached on the same state of facts, but on a somewhat different ground, namely, that the plaintiff could not claim the rights of membership, without submitting to the rules which, on becoming a member, he had agreed to observe, the validity of the contract of membership not being involved. In *Milwaukee Masons & Builders' Assoc. v. Niezerowski*, 95 Wis. 129; 70 N. W. 166; 37 L. R. A. 127; 60 Am. St. Rep. 97 (1897), an action was held not maintainable on a note given by a member of an as-

of the law so as to prevent him from enforcing liability for injury to such person or property.¹⁵

sociation of mason contractors, the only consideration therefor being the benefits and advantages (such as rebates on material) which he was entitled to receive as a member, as a result of conducting its business, which was illegal, as preventing competition. In *American Handle Co. v. Standard Handle Co.*, 59 S. W. 709, 722 (Tenn. Ch. App., 1900), admitting the right of an insolvent as "receiver of its own assets" to enforce such an agreement for the benefit of "honest creditors," such enforcement was not allowed in the absence of proof of the existence of any creditor other than one whose claims were based wholly upon the illegal agreement. Compare *Pittsburg Carbon Co. v. McMillin* (see § 174). In *American Biscuit & Manuf. Co. v. Klotz*, 44 Fed. 721 (C. C. La., 1891), the illegality of a trust combination was held ground for refusing its application for the appointment of a receiver, in a proceeding against a constituent concern for an accounting. Opposed to the authorities generally seems to be *National Wall Paper Co. v. Hobbs*, 90 Hun, 288; 35 N. Y. Suppl. 932 (1895), holding that the defendant could not, while retaining the fruits of the contract, set up that it was an unlawful conspiracy to raise the price of goods and lower wages. This decision was followed in *Noble v. McGurk*, 16 Misc. 461; 39 N. Y. Suppl. 921 (Supm. Ct., Sp. T., 1896), a case of an alleged agreement not to bid at a partition sale.

If, as between the parties, an agreement in restriction upon competition, is non-enforceable, it seems to

follow that its existence furnishes no obstacle to one of such parties entering into an agreement with a third party in conflict with the provisions of the original agreement. Thus, in *Cleveland, Columbus, Cincinnati, etc., Ry. Co. v. Closter*, 126 Ind. 348, 359; 26 N. E. 159, 162; 9 L. R. A. 754, 760; 22 Am. St. Rep. 593, 602 (1890), a combination among carriers, illegal as in restriction upon competition, was held to create no legal obstacle to a contract between a shipper, and one of the parties to the combination, providing for a rate lower than that provided by the agreement among the carriers.

It is commonly expressly provided in the anti-trust acts that a contract in violation of the act is void or non-enforceable. As to recovery for goods sold to be used for purposes of illegal combinations, see under *Tex.* (§ 232).

¹⁵ Thus, in *American Steel & Wire Co. v. Wire Drawers', etc., Unions*, 90 Fed. 608 (C. C. Ohio, 1898), the remedy by injunction against striking employees was held not impaired by the alleged circumstance that the employer was a "trust." See also *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500 (C. C. Nev., 1908). So in *Kinner v. Lake Shore & M. S. Ry. Co.*, 69 Ohio St. 339; 69 N. E. 614 (1904), of an injunction allowed to a railroad corporation against the wrongful use of tickets, against the objection that the plaintiff was party to an illegal combination. So in *Liverpool & London & Globe Ins. Co. v. Clunie*, 88 Fed. 160, 170 (C. C. Cal., 1898), of a suit by a num-

§ 169. **Agreement not related to restriction.**—Even as between the parties to an illegal restriction upon competition, an agreement not related to such illegal restriction is enforceable, and *a fortiori* is this the case as between a third person and a party to such illegal restriction.¹⁶ Thus such party may en-

ber of insurance companies to restrain illegal action by a State commissioner of insurance, held maintainable against the objection that the complainants were members of a combination illegal as creating restrictions upon competition in the business of insurance. The remedy for infringement of a patent, is not impaired by the circumstance that the holder of the patent is a party to an agreement in restriction upon competition in the business to which the patent relates. *Strait v. National Harrow Co.*, 51 Fed. 819 (C. C. N. Y., 1892; injunction to restrain such a suit denied); *Sawyer-Man Electric Co. v. Edison Electric Light Co.*, 53 Fed. 592, 598; 3 C. C. A. 605, 610 (2d C., 1892). And so of remedy for infringement of trade mark. *Independent Baking Powder Co. v. Boorman*, 130 Fed. 726 (C. C. N. J., 1904). In *California Cured Fruit Assoc. v. Stelling*, 141 Cal. 713; 75 Pac. 320 (1904), an action by a buyer against sellers for the recovery of possession of articles that had been delivered to the former under the contract of sale, was held maintainable against the objection that such contract was illegal as in restraint of trade.

¹⁶ In *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537; 38 N. E. 729 (1894), in an action by a foreign corporation to enforce liability on a subscription to stock, it was held no defense that the corporation had entered upon projects illegal as in

restriction upon competition, the objects as stated in the certificate of incorporation being legal, and there being no evidence of any corporate acts pointing to any illegal purpose in the formation of the corporation. And held no defense that the promoters of the corporation deceived the authorities of the State where it was formed, as to their real purpose in forming it. So held where the corporation was insolvent. To similar effect, *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58; 42 N. E. 403 (1895), an action by the same plaintiff. See also *Globe Sewer Pipe Co. v. Otis*, 22 N. Y. Suppl. 411 (Supm. Ct., Gen. T., 1893). On the same principle in *Dennehy v. McNulta*, 86 Fed. 825; 30 C. C. A. 422; 41 L. R. A. 609 (7th C., 1898), was denied the right to recover back money paid to an illegal combination. But such a defense has in some cases been made available by statute. See c. XX.

The doctrine stated in the text seems to have been overlooked in *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689 (C. C. N. Y., 1901), where, in a suit by a railroad corporation to enjoin ticket brokers from inducing purchasers of tickets to use them in a manner contrary to the special arrangements under which such tickets were purchased, it was held a defense that the corporation was party to an agreement to fix rates of transportation, such agreement being illegal as in restriction upon competition, and the tick-

force liability for goods sold¹⁷ or services rendered,¹⁸ or such

et having been issued in pursuance of such agreement. To the contrary under like conditions seems *Pennsylvania Co. v. Bay*, 138 Fed. 203 (C. C. Ill., 1905).

For examples of provisions held enforceable as separable from agreements in restriction upon competition, see *Hartford & New Haven R. R. Co. v. N. Y. & New Haven R. R. Co.*, 3 Robt. (N. Y.) 411 (1865); *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1 (C. C. Iowa, 1882). See *Hoffman v. Brooks*, 23 Am. Law Reg. (N. S.) 648 (Super. Ct. Cin., 1884); *State v. New Orleans Warehouse Co.*, 109 La. 64; 33 So. 81 (1902); *Matthews Glass Co. v. Burk*, 162 Ind. 608; 70 N. E. 371 (1904). For a case where an accounting was allowed for money received as profits on an illegal cornering contract, see *Wells v. McGeoch*, 71 Wis. 196; 35 N. W. 769 (1888). In *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327 (1869), where the agreement between parties to a cornering agreement was, that one should apply the funds of the other already in his hands, so far as should be necessary for the payment of the latter's share of the expenses, the latter was held not precluded from recovering the unexpended balance of the fund, but not allowed to recover for what had actually been expended.

In *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288, 306; 59 Atl. 1088, 1095; 105 Am. St. Rep. 812 (1904), although an agreement by the seller of a business was sustained on com-

mon law grounds as not unreasonably in restraint of trade, it was held in violation of the Federal anti-trust act. In *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 522; 43 Atl. 723, 729; 46 L. R. A. 255, 262; 78 Am. St. Rep. 612 (1899), the existence of a combination among a number of manufacturers, illegal as in restriction upon competition, was held not to invalidate contracts by different members thereof for the sale of their plants, the court saying: "The public interest would be amply protected by invalidating the agreement of the association for the control of prices, and the disconnected agreement of sale would be enforced as other contracts." This decision was in *Metcalf v. American School Furniture Co.*, 122 Fed. 115, 121 (C. C. N. Y., 1903), applied in refusing relief to a stockholder against the transfer by a corporation of its property to a corporation assumed to have been organized for the purpose of creating an illegal restriction upon competition, although the directors of the corporation so transferring "aided in the general undertaking to incorporate such company and to acquire by purchase the good will and assets generally of other concerns engaged in a similar industry." But this decision seems on this point opposed to the weight of authority. See § 172 and thereunder *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288; 59 Atl. 1088; 105 Am. St. Rep. 812 (1904).

¹⁷ *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352;

¹⁸ Thus held no defense to a proceeding to enforce liability for serv-

ices rendered by tugs, that the tug-owners were parties to such an

liability may be enforced against him, though, as will presently be seen, it is otherwise in case of an agreement related to the illegal restriction.¹⁹

§ 170. **Non-enforcibility of agreement because of relation to restriction.**—An agreement, legal considered by itself, is frequently non-enforcible because of its relation to an illegal restriction upon competition. Such an agreement may be one between the parties to the illegal restriction and in such case the question is merely one of severability.²⁰ More difficult ques-

56 N. W. 864; 39 Am. St. Rep. 902 (1893). So under Federal act. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545; 22 Supm. 431, 434; 46 L. Ed. 679 (1902); *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242; 74 C. C. A. 462 (8th C., 1906). To similar effect, *Houck v. Wright*, 77 Miss. 476; 27 So. 616 (1899). See effect of *Connolly v. Union Sewer Pipe Co.*, discussed in *Continental Wall Paper Co. v. Voight*, 212 U. S. 227, 260; 29 Supm. 280, 291 (1909). So in proceeding to enforce contract for exclusive employment. *Harrison v. Glucose Sugar Refining Co.*, 116

Fed. 304; 53 C. C. A. 484; 58 L. R. A. 915 (7th C., 1902). But such a defense has in several instances been made available under the anti-trust acts. See c. XX. In 2 *Eddy on Combinations*, § 913, it is suggested that such legislation may be unconstitutional and is difficult to apply in practice. In *Crystal Ice Co. v. Wylie*, 65 Kan. 104; 68 Pac. 1086 (1902), it was held no cause for enhancing damages for breach of a contract for the sale of goods, that the seller had agreed to deliver all the goods manufactured by it to another, in violation of the anti-trust law.

agreement. *The Charles E. Wise-wall*, 74 Fed. 802 (D. C. N. Y., 1896); affirmed in 86 Fed. 671; 30 C. C. A. 339; 42 L. R. A. 85 (2d C., 1898). See as to insurance of property by member of trust formed for purpose of controlling the price thereof, *Springfield Fire & Marine Ins. Co. v. Cannon*, 46 S. W. 375 (Tex. Civ. App., 1898).

¹⁹ See § 170.

²⁰ In *Burlington, C. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 652 (C. C. Minn., 1887), an agreement to make a special rate for shipments of coal reaching a certain amount, being held void, as in restriction upon competition, was

also held not separable from a provision in the same agreement, not to ship less than a certain amount for less than a certain rate. In *Drake v. Siebold*, 81 Hun, 178; 30 N. Y. Suppl. 697 (1894), a case of an illegal combination among coal dealers to fix the price, a contract between two parties thereto for the sale of coal at the price fixed by the combination, was held non-enforceable, though it was intimated that the seller was not necessarily precluded from all remedy for non-payment of coal delivered under the contract. See *Erie Railway Co. v. Union Locomotive, etc., Co.*, 35 N. J. Law, 240 (1871); *Hunt v. Riverside*

tions, however, are presented by agreements between a third person and a party to the illegal restriction.²¹ "Upon the question whether the particular contract sought to be enforced arises out

Co-operative Club, 140 Mich. 538; 104 N. W. 40; 112 Am. St. Rep. 420 (1905); 15 Am. & Eng. Enc. of Law, 2d ed., pp. 988-91. See *Edwards County v. Jennings*, 89 Tex. 618; 35 S. W. 1053 (1896), for an application of the rule that a promise made upon several considerations, one of which is unlawful, is void.

For a careful discussion, see *Central N. Y. Telephone, etc., Co. v. Averill*, 58 Misc. 59; 110 N. Y. Suppl. 273 (Supm. Ct., Sp. T., 1908), where it was held that there could be "no severance of the legal and illegal parts of the contract."

²¹ Compare *American Handle Co. v. Standard Handle Co.*, 59 S. W. 709, 720 (Tenn. Ch. App., 1900). In *Houck v. Anheuser-Busch Brewing Assoc.*, 88 Tex. 184; 30 S. W. 869 (1895), an agreement by a seller to sell to none but the buyer, was held illegal, as calculated to aid the buyer in producing an illegal restriction upon competition, overruling on this point decision below in 27 S. W. 692 (Tex. Civ. App., 1894). In *National Harrow Co. v. Hench*, 84 Fed. 226 (C. C. N. Y., 1898), a suit between the same parties as in 76 Fed. 667; 83 Fed. 36; 27 C. C. A. 349; 39 L. R. A. 299 (for facts, see § 120), a suit upon the theory that, holding the legal title to the patents, the complainant could sue the owners of the equitable title, not as licensees, but as infringers, was held not maintainable, the assignment under which the complainant claimed being regarded as part of the general illegal

scheme. See also *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 178 (C. C. N. Y., 1905).

It may be a question whether the rule that an agreement, legal considered by itself, may be illegal by means of its relation to an illegal restriction upon competition, was not overlooked in certain decisions under the Federal anti-trust act. See § 199. For instances, however, of such agreements sustained independently of such act, see *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; 56 N. W. 864; 39 Am. St. Rep. 902 (1893); *Olmstead v. Distilling & Cattle Feeding Co.*, 77 Fed. 265 (C. C. Ill., 1896); affirmed in *Dennehy v. McNulta*, 86 Fed. 825; 30 C. C. A. 422; 41 L. R. A. 609 (7th C., 1898), where the non-performance of the condition for exclusive trade, was held to prevent recovery on the vouchers, it being held that, the condition being the sole consideration for the promise, if illegal, left no consideration to support it. In *Olmstead v. Distilling & Cattle Feeding Co.*, the court, following *Re Greene*, 52 Fed. 104 (C. C. Ohio, 1892), erroneously relied on *Mogul S. S. Co. v. McGregor*, App. Cas. (1892) 25, as an authority, overlooking the distinction there clearly taken between agreements illegal as between the parties, and those giving a right of action to an outside party. This distinction was pointed out in *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 737; 39 Atl. 923, 945 (1898).

As to when agreement may be le-

of an illegal transaction, the court will not be restricted to a partial statement of the facts, but will consider all the circumstances connected with the transaction."²²

§ 171. **Remedies by or against agent.**—The doctrine already considered precluding enforceability of an agreement in restriction upon competition has been applied to the case of one seeking recovery for services rendered or money advanced as agent in furtherance of such an illegal restriction.²³ On the other hand, an agent who has received money or other property from, or on behalf of, his principal, is held not allowed to assert as against the principal seeking to recover such property that it was received in the course of a transaction illegal as in restriction upon competition.²⁴

§ 172. **Agreement of sale.**—The question of the non-enforceability of an agreement because of its relation to an illegal

gal, though based on executed illegal transaction that furnished a motive, see *Brightman v. Bates*, 175 Mass. 105; 55 N. E. 809 (1900).

²² *Continental Wall Paper Co. v. Voight*, 212 U. S. 227, 266; 29 Supm. 280, 294 (1909).

²³ *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396; 9 Supm. 553; 32 L. Ed. 979 (1889). Here the illegality of the restriction was known to the agent. See 15 Am. & Eng. Enc. of Law, 2d ed., p. 1010. So in case of illegal contracts for future delivery. See 14 Id., p. 640. On the other hand, in *Wright v. Crabbs*, 78 Ind. 487 (1881), recovery was allowed for services as broker in procuring contracts for the purchase of wheat, in ignorance of the fact that the employer was utilizing such contracts for creating a "corner" in the wheat.

²⁴ *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140, 152 (1863); *Hardy v. Jones*, 63 Kan. 8; 64 Pac. 969; 88 Am. St. Rep. 223 (1901);

15 Am. & Eng. Enc. of Law, 2d ed., p. 1009. But in *Leonard v. Poole*, 114 N. Y. 371; 21 N. E. 707; 4 L. R. A. 728; 11 Am. St. Rep. 667 (1889), an action for an accounting was held not maintainable, notwithstanding the objection that the parties from whom the accounting was sought, were mere agents of the others; this on the ground that the parties, being engaged in a criminal scheme to advance prices, were all principals. But this reasoning seems inconclusive, the proceeding being for the enforcement, not of a criminal, but of a *civil* liability. See also *Keene v. Kent*, 4 N. Y. State Rep. 431 (Supm. Ct., Gen. T., 1886), where the same contract was involved. And in *Samuels v. Oliver*, 130 Ill. 73; 22 N. E. 499 (1889), recovery was not allowed, either by agent against principal, or *vice versa*, for money received or advanced in promotion of a "cornering" transaction.

restriction upon competition has most frequently arisen in connection with agreements of sale. As has already been seen, though the circumstance that one is a party to such an illegal restriction does not necessarily prevent him from enforcing liability or prevent liability being enforced against him under an agreement to sell goods or render services, it is otherwise, in case of an agreement related to the illegal restriction.²⁵ Thus an agreement to sell to a party to such restriction may, because of the existence of such relation, be non-enforceable by such party.²⁶ There is some conflict among the decisions as to the

²⁵ See § 170.

²⁶ In *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387; 18 Pac. 391; 9 Am. St. Rep. 211 (1888), recovery was not allowed for breach of an agreement by a manufacturer of lumber for sale thereof, it appearing that the agreement was part of a scheme on the part of the plaintiff, to form a combination among all the manufacturers of lumber in the vicinity, for the purpose of increasing the price, limiting the supply, and giving the plaintiff the control thereof. By the agreement the defendant was not to manufacture other lumber to be sold in the region, under a penalty. The scheme included similar contracts between the plaintiff and other manufacturers in the region. So in *Pacific Factor Co. v. Adler*, 90 Cal. 110; 27 Pac. 36; 25 Am. St. Rep. 102 (1891), recovery was not allowed for breach of an agreement to sell and deliver 187,500 grain bags or burlaps, it appearing that the agreement was part of a scheme on the part of the plaintiff to control the supply of grain bags within the State, for the purpose of increasing the price. To similar effect, *Finck v. Schneider Granite Co.*, 187 Mo. 244, 269; 86

S. W. 213, 220; 106 Am. St. Rep. 452 (1905). In *Bishop v. American Preservers' Co.*, 157 Ill. 284, 306; 41 N. E. 765, 772; 48 Am. St. Rep. 317 (1895), in an action of replevin, it appearing that the plaintiff was a party to an illegal combination in restraint of trade, held error to exclude evidence offered to sustain a defense that "the transfer of defendant's goods and machinery and business, by means of a bill of sale to the plaintiff, and the delivery of the shares of stock to defendant, and the redelivery thereof to the trustees of the combination in exchange for trust certificates, and the appointment of defendant as custodian of the property and agent to carry on the business theretofore exclusively his own, were all parts of the illegal scheme, and aids in the accomplishment of the unlawful objects of the trust." So in *State v. Nebraska Distilling Co.*, 29 Neb. 700; 46 N. W. 155 (1890), a conveyance of property was held illegal, as made to a combination formed to restrict competition.

In *Fisher v. Flickinger Wheel Co.*, 28 Ohio Cir. Ct. R. 501 (1906), the rights of creditors of a party to an illegal combination being involved,

conditions under which such agreement is non-enforcible by the seller. That it is enforcible by him in case of his ignorance of the existence of any illegal restriction seem established.²⁷ And, according to many decisions, it is enforcible by him notwithstanding knowledge by him of the existence of such illegal restriction, it being essential, according to such decisions, that he be a participant in the illegal transaction.²⁸ According to many other decisions, however, mere knowledge seems sufficient.²⁹ Whether, in any instance, the seller "does anything beyond making the sale,"³⁰ so as to be within the doctrine thus stated, seems largely determinable according to the circumstances of the particular case.³¹ Sometimes he is quite obvi-

the court refused to give effect to a sale of personal property by such party, that was illegal as an incident of the combination, the contract of sale remaining executory, because of possession not having been given, though payment had been made. See under Me. (§ 215).

Opposed, however, to the above decisions, and to the weight of authority seem *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 43 Atl. 723; 46 L. R. A. 255; 78 Am. St. Rep. 612 (1899); *Metcalf v. American School Furniture Co.*, 122 Fed. 115, 121 (C. C. N. Y., 1903). See § 169. The latter decision may, however, be sustained within the doctrine forbidding relief against illegal contracts that have been executed. See § 174.

²⁷ In *Carter-Crume Co. v. Peurung*, 86 Fed. 439; 30 C. C. A. 174 (6th C., 1898), was sustained an agreement for the sale of the entire product of the seller, in the absence of knowledge by him that this was intended by the buyer as but one step in such an illegal combination. See as to effect of knowledge of seller that goods are to be used for an unlawful purpose, *Oli-*

ver v. Gilmore, 52 Fed. 562 (C. C. Mass., 1892).

²⁸ *Tracy v. Talmage*, 14 N. Y. 162; 67 Am. Dec. 132 (1856). See *Arnot v. Pittston & Elmira Coal Co.*, *infra*; 15 Am. & Eng. Enc. of Law, 2d ed., p. 987. As to effect of knowledge by lessor of illegality of purpose of lessee, see *Brooklyn Distilling Co. v. Standard Distilling, etc., Co.*, 120 App. D. 237; 105 N. Y. Suppl. 264 (1907); affirmed in 193 N. Y. 551; 86 N. E. 564 (1908).

²⁹ 15 Am. & Eng. Enc. of Law, 2d ed., p. 987.

³⁰ See *Arnot v. Pittston & Elmira Coal Co.*, *infra*.

³¹ In *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558, 566; 23 Am. Rep. 190, 194 (1877), recovery was not allowed for coal sold under an agreement that was part of an illegal scheme of the buyer to enhance prices. It bound the buyer to take all the coal that the seller might desire to send "north of the State line," to the extent of two thousand tons a month, it being, however, optional with the seller to deliver, and the only consideration for the agreement of the buyer being the agreement of the

ously within the rule, as in the not uncommon case of the sale being by a number of persons to a corporation organized by them in pursuance of the illegal scheme.

§ 173. **Contract in restraint of trade.**—Although, as already

seller not to sell coal to any other party, to come north of the State line. To the knowledge of the seller, the design of the buyer was to control the supply and price of coal, and but for that purpose the buyer would not have entered into the agreement. The product of the seller largely exceeded two thousand tons a month. See comments on this decision in *Packard v. Byrd*, 73 S. C. 1; 51 S. E. 678; 6 L. R. A. N. S. 547 (1905), where liability for goods sold was held enforceable, as being separable from an agreement for exclusive trade, assumed to be illegal. In *Detroit Salt Co. v. National Salt Co.*, 134 Mich. 103; 96 N. W. 1 (1903), what purported to be a written contract for the sale of the seller's entire production of salt, and was concededly not illegal on its face, was, in an action for the price of such salt, held non-enforceable because of its relation, known by the seller, to a scheme on the part of the purchaser to create an illegal restriction upon competition through this and similar contracts. In *Clancey v. Onondaga Salt Manuf. Co.*, 62 Barb. (N. Y.) 395 (1862), recovery was not allowed for the price of salt sold to a corporation formed ostensibly for the purpose of manufacturing salt, but in reality to form a combination to fix and control the price, it appearing that the sellers knew that the object of the combination was to increase the price, and that they were to receive the benefit of it. In *Van Marter v.*

Babcock, 23 Barb. (N. Y.) 633 (1857), an agreement of sale was held not illegal merely by reason of a provision that it should be void, provided the other growers of the same product should not enter into an agreement with the buyer. An agreement by which a manufacturer disabled himself from manufacturing and from selling to others, held unenforceable as part of a scheme including like agreements with other manufacturers and designed to control the manufacture of the product in question. *Cravens v. Carter-Crume Co.*, 92 Fed. 479; 34 C. C. A. 479 (6th C., 1899). See also under Ill. (§ 209), *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502 (1896). Hardly reconcilable with *Cravens v. Carter-Crume Co.* seems *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288; 59 Atl. 1088; 105 Am. St. Rep. 812 (1904), holding enforceable under like conditions an agreement by the seller in a contract for the sale of the business of mining and shipping coal, the court concluding that there appeared no intention on the part of the buyer to obtain exclusive possession of either all coal or means of transportation in the region in question. Considering, however, the extent of the operations of the buyer, such conclusion seems hardly in accord with the weight of authority. In *U. S. Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946 (C. C. Mo., 1894), it would seem that the question might have

seen, the prevention of restrictions upon competition is not the basis of the doctrine against contracts in restraint of trade,³² yet such a contract may be illegal as an incident of an illegal restriction upon competition, thus, where such an agreement, or a series of such agreements, includes those in control of the supply of a given commodity.³³

been raised, whether the covenant of the lessor in the lease under consideration, though, considered by itself, a legal contract in restraint of trade, was not illegal as calculated to advance the scheme of the lessee to create a monopoly. The court said: "The motive of the defendant (lessee) was to get rid of a dangerous and aggressive competitor in the trade of the article of which it was in practical control." In *Continental Wall Paper Co. v. Lewis Voight & Sons Co.*, 148 Fed. 939; 78 C. C. A. 567 (6th C., 1906), there being invalid under the Federal anti-trust act, an agreement among manufacturers who co-operated through the plaintiff corporation organized for the purpose of selling their product, an action against jobbers for the price of goods sold was held not maintainable, the defendants and other jobbers having entered into agreements whereby they were to buy exclusively from the plaintiff or other members of the combine and sell only according to a schedule of prices and terms of credit dictated by the plaintiff. This was affirmed in 212 U. S. 227, 261; 29 Supm. 280, 292 (1909), where the question was said to be whether the seller could have judgment "upon an account which, it is admitted by demurrer, was made up within the knowledge of both seller and buyer, with direct reference to and in execution

of certain agreements under which an illegal combination, represented by the seller, was organized."

³² See § 160.

³³ In *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 43 Atl. 723; 46 L. R. A. 255; 78 Am. St. Rep. 612 (1899), an agreement by the sellers of a pottery and its good will and business, to refrain from engaging in the business of manufacturing pottery ware, having been sustained as reasonable and valid and not in contravention of the doctrine against contracts in restraint of trade (see § 159), was held enforceable against the objection that simultaneously with the purchase under consideration, the purchaser had purchased other plants used in the manufacture of pottery ware, taking from the sellers contracts substantially identical with that under consideration, all such contracts being part of a scheme to prevent competition in the manufacture and sale of pottery ware. This decision, reversing on this point 56 N. J. Eq. 680; 39 Atl. 923 (1898) seems opposed to the current of American authority. See § 172. But see to similar effect, *Booth v. Seibold*, 37 Misc. 101; 74 N. Y. Suppl. 776 (Supm. Ct., Sp. T., 1902); *Booth v. Davis*, 127 Fed. 875, 879 (C. C. Mich., 1904).

Opposed to the current of such authority seems also *Camors-McConnell Co. v. McConnell*, 140 Fed.

§ 174. **Disaffirmance of agreement.**—Not only is an agreement in restriction upon competition non-enforceable, but, generally speaking, no proceeding can be maintained in disaffirm-

412 (C. C. Ala., 1905); affirmed in *McConnell v. Camors-McConnell Co.*, 140 Fed. 987; 72 C. C. A. 681 (5th C., 1905), where relief was allowed against breach of a vendor's contract in restraint of trade, notwithstanding the assumption that the complainant corporation was "one of an association or combination of corporations, which constitutes a monopoly." Such contract was regarded as "collateral to the said unlawful agreement or combination," though made in contemplation of the formation of the complainant corporation. In overruling the objection that the contract was "part of an unlawful scheme to monopolize," it was intimated that decisions referred to "were direct proceedings against the alleged monopolies, wherein it was sought to enjoin them," it being added: "There are no provisions in the contract here sought to be enforced which refer to the restrictions of trade, or to the regulation of the importation, sale and prices . . . evidencing an intent to establish a monopoly in such trade." Referring to certain expressions in the opinion in *Swift v. U. S.*, 196 U. S. 375; 25 Supm. 276; 49 L. Ed. 518 (1905), it was said that they "amount simply to a declaration that conduct agreed upon to effect an unlawful object may be unlawful, and that the court, when applied to in a direct proceeding therefor, will stop such conduct by injunction, as well as punish, in proper criminal proceedings, the unlawful act when completed, notwithstanding it may have been ac-

complished by separate acts ever so innocent in themselves." The court also disallowed what was stated as the "further claim" that "the complainant has entered into a combination with various other importers of fruit for the purpose of acquiring a monopoly in the importation and sale of the same, and that the contract in question was to aid and facilitate that purpose." In *U. S. Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946 (C. C. Mo., 1894), a covenant in a lease not to engage in the business covered by the lease, was held valid as a restraint of trade, but to contain "none of the elements of a combination or trust." Compare *Mollyneaux v. Wittenberg*, 39 Neb. 547; 58 N. W. 205 (1894; see under Neb., § 222). In *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596; 49 N. E. 1030; 41 L. R. A. 185; 63 Am. St. Rep. 736 (1898), a contract in restraint of trade by the seller of a business, though held invalid on a distinct ground, was condemned as tending to create a monopoly, it appearing, according to the terms of the contract, that the covenantee had ample facilities to supply the demand for the goods in question, such demand being a limited one. See also *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 560, 568; 41 N. E. 1048, 1051; 51 Am. St. Rep. 193 (1895); *Harding v. American Glucose Co.*, 182 Ill. 551, 638; 55 N. E. 577, 606; 64 L. R. A. 738, 772; 74 Am. St. Rep. 189 (1899). In *Wittenberg v. Mollyneaux*, 60 Neb. 583; 83 N. W. 842 (1900), where was sustained an

ance of such agreement.³⁴ But such proceedings have been held maintainable in disaffirmance of agreements that remain execu-

agreement by the purchaser of certain property, not to use it for hotel purposes, it was said that "if it be shown that the main purpose of the agreement is to secure a monopoly and that the purchase of the property was a mere incident or means to that end, it is within the rule applicable to ordinary combinations in restraint of trade and will not be enforced." As to lease containing covenant in restraint of trade, being invalid as in furtherance of scheme in restriction upon competition, see *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; 28 Supm. 572; 52 L. Ed. 865 (1908); affirming *Anderson v. Shawnee Compress Co.*, 17 Okla. 231; 87 Pac. 315; 15 L. R. A. N. S. 846 (1906). Very questionable seems *Stewart v. Stearns & Culver Lumber Co.*, 48 So. 19 (Supm. Ct. Fla., 1908), where was held unenforceable a lease for the purpose of conducting a general store in a village, where the lessor employed a large number of persons, it agreeing to relinquish its right to establish and maintain a commissary for its employees, to use its influence to induce them and others to purchase from the lessee, and to issue to its employees checks against their wages directed exclusively to the lessee, to be redeemed by the lessor, also to pay a commission on gross sales. Compare, however, *Redland Fruit Co. v. Sargent*, 113 S. W. 330 (Tex. Civ. App., 1908; see § 232). See also for instances of contracts in restraint of trade, held non-enforceable as tending to create illegal restrictions upon competition, *John D. Park & Sons Co. v. Hartman*, 153

Fed. 24; 82 C. C. A. 158; 12 L. R. A. N. S. 135 (1907); on appeal from *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358 (C. C. Ky., 1906); *Flower v. Smith Lumber Co.*, 47 So. 1022 (Supm. Ct. Ala., 1908); *Clemons v. Meadows*, 123 Ky. 178; 94 S. W. 13; 6 L. R. A. N. S. 847; 124 Am. St. Rep. 339 (1906); *Webb Press Co. v. Bierce*, 116 La. 906; 41 So. 203 (1906). Compare *American Brake & Beam Co. v. Pungs*, 141 Fed. 923; 73 C. C. A. 157 (7th C., 1905). See article in 20 Harv. Law Rev. 167 (1907) by Herbert Pope.

³⁴ See *Harriman v. Northern Securities Co.*, 197 U. S. 244, 295; 25 Supm. 493, 504; 49 L. Ed. 739 (1905). Thus, in *Metcalf v. American School Furniture Co.*, 122 Fed. 115, 123 (C. C. N. Y., 1903), relief was denied against the executed transfer by a corporation of its property to another corporation assumed to have been organized for the purpose of creating an illegal restriction upon competition. See also *Levin v. Chicago Gas Light & Coke Co.*, 64 Ill. App. 393 (1896). Recovery back of money deposited and forfeited under such an agreement, was not allowed in *De Witt Wire-Cloth Co. v. N. J. Wire-Cloth Co.*, 16 Daly, 529; 14 N. Y. Suppl. 277; affirmed, it seems, in 38 N. Y. State Rep. 1023 (1891). So of money advanced in promotion of an illegal cornering transaction, in *Raymond v. Leavitt*, 46 Mich. 447; 41 Am. Rep. 170 (1881; where it seems that the party advancing the money was to share in the profits); *Cummings v. Foss*, 40 Ill. App. 523 (1891); confirmed in subsequent

tory.³⁵ In such case it is immaterial whether the party seeking relief is *in pari delicto*.³⁶ And, even in case of an executed agreement, a proceeding in disaffirmance has been held maintainable by a party not *in pari delicto*.³⁷

decision in *Foss v. Cummings*, 149 Ill. 353; 36 N. E. 553 (1894; so also as to services rendered). See also *Munns v. Donovan Commission Co.*, 117 Iowa, 516; 91 N. W. 789 (1902). So of amounts paid as membership fees in association, in *Griffin v. Piper*, 55 Ill. App. 213 (1894). But for provisions for recovery of amounts paid or invested under such an agreement, thus money paid for goods sold, see under anti-trust acts, c. XX. As to recovery under Illinois statute of money paid under illegal option contract, see *Pearce v. Foote*, 113 Ill. 228, 237; 55 Am. Rep. 414, 418 (1885).

³⁵ See *Strait v. National Harrow Co.*, 18 N. Y. Suppl. 224 (Supm. Ct., Sp. T., 1891); *Tracy v. Talmage*, 14 N. Y. 162, 181; 67 Am. Dec. 132, 144 (1856); *Spring Co. v. Knowlton*, 103 U. S. 49; 26 L. Ed. 347 (Oct. T., 1880). In *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46; 23 N. E. 530; 7 L. R. A. 46 (1890), as against the receiver of an illegal trust combination, a party to the combination, who had assigned a contract to the combination, was held not entitled to the proceeds of the contract. This on the ground that the receiver united in himself, not only the right of the trust combination, but the right of creditors. Compare *American Handle Co. v. Standard Handle Co.*, 59 S. W. 709 (Tenn. Ch. App., 1900; see § 167). In *Merz Capsule Co. v. U. S. Capsule Co.*, 67 Fed. 414 (C. C. Mich., 1895), one party was held

not entitled to relief founded on the contract, but, upon the restoration by it of what it had received under the contract, it was held entitled to have such of the other parties as threatened to invade its property, restrained from interfering therewith. See also as to the duty to restore, *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1 (C. C. Iowa, 1882). In *Phœnix Bridge Co. v. Keystone Bridge Co.*, 142 N. Y. 425, 431; 37 N. E. 562, 563 (1894), relief as between parties to a combination concededly illegal as in restriction upon competition, was denied on the ground that there appeared no disaffirmance of the agreement by the plaintiff.

³⁶ *Tracy v. Talmage*, *supra*. As to conditions under which relief may be granted as between those *in pari delicto*, see *Dunbar v. American Telephone, etc., Co.*, note 37, *infra*.

³⁷ See *Cohen v. Berlin & Jones Envelope Co.*, 38 App. D. 499; 56 N. Y. Suppl. 588 (1899); *Dunbar v. American Telephone, etc., Co.*, 87 N. E. 521, 535 (Supm. Ct. Ill., 1909). This doctrine seems to have been applied in an extreme case, in *Manchester & Lawrence R. R. v. Concord R. R.*, 66 N. H. 100, 131; 20 Atl. 383, 386; 9 L. R. A. 689, 695; 49 Am. St. Rep. 582 (1890), where, as between railroad companies, parties to an agreement invalid as a monopoly by statute, but not at common law, relief was granted. See *White Star Line v. Star Line of Steamers*, 141 Mich. 604;

§ 175. **Corporate acts.**—Speaking generally, there would seem to be no reason why the form of relief against a corporate act, illegal as in restriction upon competition, should not be the same as if such act were that of an individual. It has been seen that, as a rule, no civil liability results from the existence of such a restriction,³⁸ and clearly this rule applies whether such restriction results from the acts of a mere individual or of a corporation. It has also been seen, however, that on behalf of the public a remedy is allowed against such a restriction, ordinarily by way of injunction, on the application of the attorney-general; that ordinarily, though not necessarily, it is only against acts of a corporation that such relief is granted.³⁹ But relief by injunction has comparatively rarely been sought against such acts of a corporation, a preference being shown for the more drastic remedy of a proceeding for the dissolution of the corporation.⁴⁰ But, as the application of this severe

105 N. W. 135; 113 Am. St. Rep. 551 (1905). In 2 Eddy on Combinations, § 1140, it is suggested as "a serious question whether the doctrine of *in pari delicto* should be enforced against a corporation" or against its stockholders or bondholders having no knowledge of the illegal character of the combination.

³⁸ See § 164.

³⁹ See § 166. In *Trust Co. of Georgia v. State*, 109 Ga. 736, 747; 35 S. E. 323, 326; 48 L. R. A. 520, 525 (1900), it was held proper for the attorney-general to maintain a proceeding to enjoin a combination among street railroad corporations as tending to restrict competition, the court saying: "The State has no right to an adjudication by the courts declaring void such contracts merely and solely for the reason that they are *ultra vires*, but she is entitled to this relief when injury to the public is involved."

⁴⁰ So, in *Attorney-General v.*

Great Northern Ry. Co., 1 Drewry & Smale, 154 (1860), a railway company was enjoined from carrying on the business of coal merchants, the court saying: "These companies being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce, as would enable them to drive the ordinary private traders out of the field, and create in their own favor a practical monopoly, whereby the interests of the public would be most seriously injured." Similarly, in *Stockton v. Central R. R. Co. of N. J.*, 50 N. J. Eq. 52; 24 Atl. 964; 17 L. R. A. 97 (1892), an injunction was granted, on the application of the attorney-general, against a railroad corporation leas-

remedy deprives the corporation of power for good as well as for ill, there would seem to be, on principle, strong grounds for applying the remedy by injunction, so that the corporate existence may be preserved for legitimate purposes.

§ 176. **Relief to stockholder.**—The general rules applicable

ing its road to another, such lease being part of a scheme to secure a monopoly of the Pennsylvania anthracite coal traffic.

But the distinction between an injury to a mere individual, and an injury to the public, was overlooked in *Queen Ins. Co. v. State*, 22 S. W. 1048 (Tex. Civ. App., 1893); reversed, however, in 86 Tex. 250, 274; 24 S. W. 397, 406; 22 L. R. A. 483, 496 (1893). Here, in a proceeding by the *State*, the combination to which the corporation in question was a party, was held not to be illegal. But, on the assumption that it was a combination illegal as in restriction upon competition, the relief demanded, for forfeiture of the right to do business in Texas, and for an injunction against carrying out the agreement, was regarded as improper. This on the general ground that granting such relief would be a departure from the rule that a court of equity will leave parties to an illegal contract as they have left themselves. In *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352; 36 Atl. 971 (1897); affirmed as *Miller v. American Tobacco Co.*, 56 N. J. Eq. 847; 42 Atl. 1117 (1898), where such an injunction was refused (see § 150), the court distinguished cases wherein a court of equity has enjoined the acts of a corporation as cases (55 N. J. Eq. 365; 36 Atl. 976) "where *quasi*-public corporations have acted outside of the scope of their charter privileges, or

have violated an implied limitation upon its general power, so as to create a nuisance or a public injury." (Distinguishing *Stockton v. Central R. R. Co.*, supra, as a case of an *ultra vires* agreement.) To similar effect, *McCarter (Attorney-General) v. Firemen's Ins. Co.*, 70 N. J. Eq. 291; 61 Atl. 705 (1905). But is this not begging the question? Whatever the character of the business, is it not outside the scope of the charter powers, to constitute a monopoly? Furthermore, although the question has generally arisen in connection with *quasi*-public corporations, it is clear that the decisions have not, as a rule, been based on the circumstance of a corporation being a *quasi*-public one, nor even, it would seem, on the circumstance of the acts in question being those of a corporation. It was held that the result could not be evaded by enjoining the officers individually, instead of restraining the corporation. But in *People ex rel. v. American Tobacco Co.*, 2 Chicago L. J. Weekly (Cook Co. Cir. Ct., 1897?), an injunction was granted to restrain the same corporation (here a foreign one) from transacting business. The doctrine of *Stockton v. American Tobacco Co.* was, unnecessarily, it would seem (see § 164), applied in *Dittman v. Distilling Co. of America*, 64 N. J. Eq. 537, 544; 54 Atl. 570, 573 (1903), to a proceeding not by the attorney-general, but by a mere individual.

to allowing a stockholder to obtain relief against *ultra vires* acts seem applicable to allowing him relief against a corporate act illegal as in restriction upon competition.⁴¹

§ 177. **Dissolution or ouster of corporation.**—As in case of *ultra vires* acts generally, corporations have in several instances been dissolved because of the performance of acts illegal as in restriction upon competition.⁴² But this is not necessarily the

⁴¹ *Stewart v. Erie & Western Transp. Co.*, 17 Minn. 372, 400 (1871). See *Metcalf v. American School Furniture Co.*, 122 Fed. 115 (C. C. N. Y., 1903); *MacGinniss v. Boston, etc., Consolidated Copper Mining Co.*, 29 Mont. 428, 447, 457; 75 Pac. 89, 92, 96 (1904); *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340; 48 Atl. 912 (1901); *Rafferty v. Buffalo City Gas Co.*, 37 App. D. 618, 622; 56 N. Y. Suppl. 288, 291 (1899); *Lone Star Salt Co. v. Blount*, 107 S. W. 1163 (Tex. Civ. App., 1908). Thus, as to his right to relief being barred by participation, acquiescence or delay. *Levin v. Chicago Gas Light & Coke Co.*, 64 Ill. App. 393 (1896); *Coquard v. National Linseed Oil Co.*, note 42, *infra* (which see also as to right to maintain a suit for dissolution of the corporation).

In *Harding v. American Glucose Co.*, 182 Ill. 551, 625; 55 N. E. 577, 602; 64 L. R. A. 738, 767; 74 Am. St. Rep. 189 (1899), where the combination declared illegal involved the conveyance by each of several corporations of its property to a new corporation organized to conduct the same kind of business, relief against such conveyance was granted at the suit of a stockholder of the conveying corporation. It would seem, however, that the decision might have rested solely on the right of a dissenting stockholder of

a solvent going corporation to prevent the sale of its property and abandonment of its business (182 Ill. 631; 55 N. E. 604; 64 L. R. A. 769), without reference to the circumstance of such conveyance being an incident of an illegal restriction upon competition.

In *Dunbar v. American Telephone, etc., Co.*, 224 Ill. 9; 79 N. E. 423; 115 Am. St. Rep. 132 (1906); 87 N. E. 521, 534 (1909), in case of purchase by one corporation of stock in another for the purpose of creating a monopoly, relief was allowed to stockholders of the latter corporation. To like effect, *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869, 879 (C. C. Mich., 1907). See also *Continental Securities Co. v. Interborough Rapid Transit Co.* 165 Fed. 945 (C. C. N. Y., 1908).

For suggestion that right of rescission be allowed to stockholder joining combination in ignorance of its illegality, see 2 *Eddy on Combinations*, § 1138-40.

⁴² On this ground judgments were rendered dissolving the corporations, in *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448; 41 N. E. 188; 47 Am. St. Rep. 200 (1895); *State v. Nebraska Distilling Co.*, 29 Neb. 700; 46 N. W. 155 (1890); *People v. North River Sugar Refining Co.*, 54 Hun. 354; 7 N. Y. Suppl. 406; 5 L. R. A. 386 (1889);

remedy to be applied. It seems to have been well said: "The punishment to be imposed rests in the sound judicial discretion of the court. It need not necessarily be a general judgment of ouster. It may be an ouster of the right to do the particular

affirmed in 121 N. Y. 582; 24 N. E. 834; 9 L. R. A. 33; 18 Am. St. Rep. 843 (1890); *People v. Milk Exchange*, 145 N. Y. 267; 39 N. E. 1062; 27 L. R. A. 437; 45 Am. St. Rep. 609 (1895); *People ex rel. v. American Sugar Refining Co.*, 7 Ry. & Corp. L. J. 83 (Super. Ct. San Francisco, 1890). See *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268; 22 N. E. 798; 8 L. R. A. 497; 17 Am. St. Rep. 319 (1889); *People ex rel. v. Chicago Live Stock Exchange*, 170 Ill. 556; 48 N. E. 1062; 39 L. R. A. 373; 62 Am. St. Rep. 404 (1897); *State ex rel. v. Portland Natural Gas & Oil Co.*, 153 Ind. 433, 491; 53 N. E. 1089, 1092; 53 L. R. A. 413, 416; 74 Am. St. Rep. 314 (1899). But a suit for dissolution of the corporation cannot be maintained by a mere stockholder. *Coquard v. National Linseed Oil Co.*, 171 Ill. 480; 49 N. E. 563 (1898). Thus, in *MacGinniss v. Boston, etc., Consolidated Copper, etc., Mining Co.*, 29 Mont. 428, 447; 75 Pac. 89, 92 (1904), in a stockholder's suit, it was held not a proper issue whether a combination formed by another corporation through its officers and the stockholders of the plaintiff's corporation and other corporations was a monopoly and in violation of provisions rendering the plaintiff's corporation liable to punishment and a violation of its franchises and property. Upon forfeiture of the charter of a corporation for joining or maintaining a monopoly, held, under the California statutes, that

the appointment of a receiver was not proper. *Havemeyer v. Superior Court*, 84 Cal. 327; 24 Pac. 121; 10 L. R. A. 627; 18 Am. St. Rep. 192 (1890). Compare *Cameron v. Havemeyer*, 12 N. Y. Suppl. 126 (Supm. Ct., Sp. T., 1890), where receivers were appointed of property held under the Sugar Trust agreement declared illegal in *People v. North River Sugar Refining Co.*, supra. As to proceedings in an action to dissolve the combination to which the North River Sugar Refining Company was a party, see *Gray v. De Castro & Donner Co.*, 10 N. Y. Suppl. 632 (Supm. Ct., Gen. T., 1890). As to appointment of receiver of foreign corporation, see *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112; 29 Supm. 227 (1909); dismissing writ of error to 105 S. W. 851 (Tex. Civ. App., 1907); see also decisions in 106 S. W. 326 (Supm. Ct. Tex., 1907); 103 S. W. 836 (Tex. Civ. App., 1907). As to jurisdiction of State and Federal courts respectively in such case, see *Palmer v. Texas*, 212 U. S. 118; 29 Supm. 230 (1909).

In *Gray v. Oxnard*, 59 Hun, 387; 13 N. Y. Suppl. 86 (1891), the receiver of the property of the corporation dissolved on the ground of participation in such combination was held not entitled to recover any part of the assets or earnings of the illegal combination, the right to such recovery being in the holders of the trust certificates if in any one. In *See v. Heppenheim*, 55 N. J. Eq. 240; 36 Atl. 966 (1897);

act complained of, or it may be a suspensive judgment of ouster with a fine accompaniment, or it may be a simple fine if it appears that the trust, pool or conspiracy complained of and proved has been abandoned.”⁴³

affirmed as *Naumberg v. See*, 56 N. J. Eq. 453; 41 Atl. 1116 (1897), the circumstance that a corporation was formed to create a monopoly, was held not to make the attorney-general a necessary party to a proceeding brought by the receiver of the corporation after its dissolution, the suit relating “wholly to contractual and statutory obligations arising out of its existence and operations.” The court said: “The State presumably would be interested either in preventing the organization of such a corporation, or in arresting its work after its organization. Here, however, the company is already dissolved, and therefore harmless.” In the anti-trust acts provision is commonly made for forfeiture of the rights of a corporation, foreign or domestic, for participation in an act illegal

as in restriction upon competition. See c. XX.

⁴³ *State ex inf. Crow v. Armour Packing Co.*, 173 Mo. 356, 392; 73 S. W. 645, 654; 61 L. R. A. 464, 474; 96 Am. St. Rep. 515 (1903). Thus, in *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137, 189; 30 N. E. 279, 291; 15 L. R. A. 145, 160; 34 Am. St. Rep. 541, 556 (1892), the judgment was of ouster of the corporation from the right to make and perform the agreement. As to quo warranto as remedy, see *State ex rel. v. Standard Oil Co.*, 110 S. W. 565, 572 (Supm. Ct. Tenn., 1908). As to quo warranto proceedings against foreign corporation, see under Mich. (§ 217). As to contempt proceedings for failure to comply with such judgment, see 35 Am. Law Rev. 102 (1901).

CHAPTER XVIII

LEGISLATION

- § 178. Respective power of Congress and of the States.
- 179. Constitutional limitations, i. e., inhibition against depriving of life, liberty or property.
- 180. Necessity for legislation.
- 181. Class legislation.

§ 178. **Respective power of Congress and of the States.**—Any power that a State may possess to legislate as to restrictions upon competition is limited as to its effect, generally speaking, to the territory of such State.¹ It is further subject to important limitations arising under the provision of the Federal constitution conferring upon Congress power “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”² Such power seems, so far at least

¹ See *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 466; 60 S. W. 91, 108; 51 L. R. A. 151, 170; 81 Am. St. Rep. 368 (1901). See under Ark. (§ 205); Ill. (§ 209); Mo. (§ 220); Tex. (§ 232). That a statute is to be construed as excluding from its operation subjects or classes upon which the legislature has no power to legislate, though comprehended within its general terms, see *People ex rel. Akin v. Butler Street Foundry Co.*, 201 Ill. 236, 249; 66 N. E. 349, 353 (1903). In several instances the operation of an anti-trust act is by its express terms confined to the territory of the State, thus as to sales within the State.

² Thus a statute of a State was

held inapplicable in determining the validity of a contract involving transportation within the scope of commerce clause, in *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242; 74 C. C. A. 462 (8th C., 1906). See also *Frank A. Menne Factory v. Harback*, 85 Ark. 278; 107 S. W. 991 (1908); *U. S. v. American Tobacco Co.*, 164 Fed. 700, 706 (C. C. N. Y., 1908).

In *State v. Virginia-Carolina Chemical Co.*, 71 S. C. 544, 560; 51 S. E. 455, 461 (1905), it was thought, though the point was unnecessary to the decision, that there was invalid, as in contravention of the commerce clause, the prohibition of the State anti-trust act against contracts “made with a view to lessen, or which tends to lessen,

as we are here concerned, exclusive of any exercise of power to regulate such commerce under authority of a State.³ In our view, at least, commerce, within the scope of the commerce clause, essentially consists in *transportation*,⁴ there being excluded, however, as a rule, transportation between points both within a State, as well as other transactions carried on wholly within the State, in particular, sale or manufacture.⁵

§ 179. **Constitutional limitations, i. e., inhibition against depriving of life, liberty or property.**—The legislative power, both

full and free competition in the importation or sale of articles imported into this State.”

In *Commonwealth v. Strauss*, 191 Mass. 545; 78 N. E. 136; 11 L. R. A. N. S. 968 (1906), the prohibition of Mass. R. L. (1902), c. 56, § 1 (see § 94), against making it a condition of a sale, that the purchaser shall not sell or deal in goods of any other person, was sustained as not in contravention of the commerce clause, though said to “indirectly affect it in those cases where contracts are made for the sale and transportation of property in another State to a purchaser in this State.”

See under Federal act, c. XIX; also under S. C. (§ 229); Tenn. (§ 231); Tex. (§ 282). For provision as to foreign commerce, see under N. Y. (§ 224).

See articles in 34 Am. Law Rev. 186 (1900) by E. W. Huffcut; 37 Id. 237 (1903) by W. S. Logan; Id. 703, by J. B. Sanborn; 17 Harv. Law Rev. 83 (1903-4) by A. L. Humes; 11 Yale Law Jour. 273 (1901-2) by J. B. Dill; 12 Id. 117 (1902-3) by W. S. Logan; 2 Mich. Law Rev. 358 (1903-4) by H. L. Wilgus; 18 Pol. Sci. Quart. 11, 462 (1903) by A. D. Adams; 9 Va. Law Reg. 463 (1902-3) by

John Goode; 51 Cent. L. J. 45 (1900) by D. H. Pingrey; 5 Chicago Weekly L. J. 128, 135 (1900) by W. A. Conover.

³ See Cooke on the Commerce Clause, § 55.

⁴ See Cooke on the Commerce Clause, § 4. That insurance is not commerce within the meaning of such provision, see Id., § 7; *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816, 821 (C. C. Neb., 1901).

⁵ *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 247; 20 Supm. 96, 109; 44 L. Ed. 136 (1899); *Gibbs v. McNeeley*, 102 Fed. 594 (C. C. Wash., 1900); *The Charles E. Wiswall*, 86 Fed. 671; 30 C. C. A. 339; 42 L. R. A. 85 (2d C., 1898); *U. S. v. American Tobacco Co.*, 164 Fed. 700, 712 (C. C. N. Y., 1908); but as to a Territory, see *Moore v. U. S.*, 85 Fed. 465; 29 C. C. A. 269 (8th C., 1898). See under Federal act, § 189. So, even in case of a combination that also relates to commerce within the scope of the commerce clause. *People ex rel. Akin v. Butler Street Foundry Co.*, 201 Ill. 236, 250; 66 N. E. 349, 353 (1903); *State v. Jack*, 69 Kan. 387, 401; 76 Pac. 911, 915; 1 L. R. A. N. S. 167, 174 (1904).

of Congress and of the States, is subject to various constitutional limitations,⁶ notably, so far as we are here concerned, that imposed (as to Congress by the Fifth, and as to the States by the Fourteenth Amendment), by the inhibition against "depriving of life, liberty, or property, without due process of law." But, notwithstanding such inhibition, it is established that legislation by a State against restrictions upon competition is justifiable.⁷ Nor does it seem necessary to determine whether or not it is to be referred to what has commonly been termed the "police power."⁸ This is so, at any rate, as to such restrictions upon competition as are illegal at common law, though we submit

⁶ As to effect of contract clause of Federal constitution, with reference to application of State anti-trust act to combination formed before, but carried out after act took effect, see *State v. Missouri, K. & T. Ry. Co.*, 99 Tex. 516; 91 S. W. 214; 5 L. R. A. N. S. 783 (1906); *Waters-Pierce Oil Co. v. Texas*, *infra* (212 U. S. 107; 29 Supm. 225). See under Tex. (§ 232). As to objection of impairment of obligation of contract by revocation of permit to foreign corporation to do business, see *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 344; 29 Supm. 370, 376 (1909). As to objection to statute as vague, indefinite and uncertain, and as imposing excessive fine, see also under § 232.

⁷ Such legislation was sustained in *Smiley v. Kansas*, 196 U. S. 447; 25 Supm. 276; 49 L. Ed. 546 (1905; see § 212); affirming *State v. Smiley*, 65 Kan. 240, 261; 69 Pac. 199, 206; 67 L. R. A. 903, 912 (1902); *National Cotton Oil Co. v. State*, 197 U. S. 115; 25 Supm. 379; 49 L. Ed. 689 (1905; see § 232); *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401; 26 Supm. 66; 50 L. Ed. 246 (1905; see §

211); reversing *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121 (C. C. Iowa, 1903); *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; 29 Supm. 220 (1909; see § 232). See also *Hammond Packing Co. v. Arkansas*, *supra* (see under § 205).

See in *State v. Smiley* (65 Kan. 244; 69 Pac. 200; 67 L. R. A. 906) discussion of effect of *Re Grice*, 79 Fed. 627 (C. C. Tex., 1897; see § 232); *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816 (C. C. Neb., 1901; see § 222).

See articles in 16 Harv. Law Rev. 329 (1902-3) by H. W. Chaplin; 17 *Id.* 156, 217 (1903-4) by Bruce Wyman; 3 Va. Law Reg. 163, 241, 261 (1897-8) by W. L. Royall.

In 2 *Eddy on Combinations*, §§ 902, 903, is suggested a distinction between corporations and individuals, etc., as to the constitutional application of anti-trust legislation.

As to provision for establishment of character of trust or combination "by proof of its general reputation as such," see under Ohio (§ 227).

⁸ See *State ex rel. Durner v. Huegin*, 110 Wis. 189, 253; 85 N. W. 1046, 1063; 62 L. R. A. 700, 742 (1901).

that on principle this is not so clear as to those that are legal at common law.⁹ What has just been said seems substantially applicable to legislation by Congress. That is to say, in the exercise of the power to regulate commerce or transportation, it may, like the States, and notwithstanding the Fifth Amendment, legislate against restrictions upon competition in such commerce or transportation, in other words, prescribe therefor "the rule of free competition."¹⁰ And, according to the authorities, such power of legislation seems not limited to such restrictions as are illegal at common law, but extends to such as are legal at common law, thus what may be termed a *reasonable* restriction¹¹ (here assuming that the test of reasonableness is properly applied in determining the validity of such a restriction). And notwithstanding that the liberty guaranteed by the Fifth and Fourteenth Amendments includes, generally speaking, liberty to contract, it is clear enough that the power of legislation includes the power to prohibit contracts that operate by way of restriction upon competition.¹² "Having the power to

⁹ See *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.*, 75 S. C. 378; 55 S. E. 973; 9 L. R. A. N. S. 501 (1905); *State v. Virginia-Carolina Chemical Co.*, 71 S. C. 544, 568; 51 S. E. 455, 463 (1905). See note 11, *infra*. See under Mo. (§ 220); Neb. (§ 222); Ohio (§ 227); Tex. (§ 232).

In *Bingham v. Brands*, 119 Mich. 255; 77 N. W. 940 (1899), however, the prohibition of the Michigan act (see § 217) was held to apply to a contract in restraint of trade regarded by the court as legal at common law. See also § 217 as to L. 1905, c. 329.

¹⁰ *Northern Securities Co. v. U. S.*, 193 U. S. 197, 337; 24 Supm. 436, 457; 48 L. Ed. 679 (1904; see § 197). As to the distinction, if any, between the power of Congress under the commerce clause, as lim-

ited by the Fifth Amendment, and the power of the States as limited by the Fourteenth, see *Carroll v. Greenwich Ins. Co.*, *supra*, where, in sustaining a State anti-trust act, it was said: "While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the Fifth Amendment, it would be hard to say that a State law in like terms was void under the Fourteenth." See decision below here reversed, in *Greenwich Ins. Co. v. Carroll*, *supra*, and criticism in *State v. Smiley*, *supra*, of view expressed in *Niagara Fire Ins. Co. v. Cornell*, *supra*. See under Neb. (§ 222).

¹¹ See under Federal act (§ 194).

¹² *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 227, 235; 20 Supm. 96, 102, 105; 44 L. Ed. 136

pass laws of this character, of course the State may provide for proceedings to enforce the same. The State, keeping within constitutional limitations, may provide its own method of procedure and determine the methods and means by which such laws may be made effectual."¹³

§ 180. **Necessity for legislation.**—As will hereafter be seen in detail,¹⁴ there is a considerable mass of legislation by the States, as well as by Congress, by way of prohibition of restrictions upon competition. Such legislation, besides being subject to the constitutional limitations elsewhere considered,¹⁵ is governed by the rules of construction applicable to statutes generally.¹⁶ Leaving out of consideration whether such legislation is desirable on purely economic grounds, it remains to determine the extent of the necessity therefor from a strictly legal standpoint. Such extent would seem to be very limited. The illegality of such restrictions as are complete, or approximately complete, is, in this country at least, generally recognized as

(1899). See *Northern Securities Co. v. U. S.*, supra (193 U. S. 332; 24 Supm. 454).

¹³ *Waters-Pierce Oil Co. v. Texas*, supra (212 U. S. 107; 29 Supm. 225). This was said with reference to the contention that the rulings of the State court "as to the admission of testimony, and upon questions of general law deprived the defendant of its property and rights without due process of law."

¹⁴ See cc. XIX, XX. See such legislation epitomized and criticised by S. C. T. Dodd, in 7 *Harv. Law Rev.* 157, 164 (1893). As to early legislation in England, see article in 3 *Mich. Law Rev.* 119 (1904) by D. M. Frederiksen. As to edict of the Emperor Zeno in A. D. 483, see 1 *Eddy on Combinations*, §§ 4, 5; of the French minister Turgot in 1776, note to *Slaughter-House Cases*, 16 *Wall.* 36, 110; 21 *L. Ed.* 394 (Dec. T., 1872).

As to necessity for such legislation, see "Commercial Law and Modern Commercial Combinations" (being part of report of committee of American Bar Association), 37 *Am. Law Rev.* 828 (1903); article in 37 *Am. Law Rev.* 845 (1903) by W. A. Glasgow.

¹⁵ See § 179.

¹⁶ Thus the rule of strict construction of a penal statute. *U. S. v. Trans-Missouri Freight Assoc.*, 58 *Fed.* 58, 77; 7 *C. C. A.* 15, 81; 24 *L. R. A.* 73, 87 (8th C., 1893); *Greer v. Stoller*, 77 *Fed.* 1 (*C. C. Mo.*, 1896).

As indicating a tendency to restrict such legislation to combinations "detrimental to the interests of the public," see under § 219, *Yazoo & M. V. R. Co. v. Searles*, 85 *Miss.* 520, 529; 37 *So.* 939, 942; 68 *L. R. A.* 715, 721 (1905).

existing independently of statute.¹⁷ And, where such illegal restriction is the result of an agreement, the illegality renders the agreement non-enforceable,¹⁸ though, as a rule, no civil liability results merely from the existence of such a restriction.¹⁹ Generally speaking, however, legislation against such restrictions is designed for the purpose of enforcing criminal, rather than civil, liability, and it is at any rate not clear that there exists at common law any criminal liability for such a restriction.²⁰ In this view there is a justification of legislation against restrictions upon competition, to say nothing of the advantages derived from well-defined rules of procedure and evidence. But, as has been seen elsewhere, anti-trust legislation generally has, particularly by reason of the failure to distinguish between the doctrine against restrictions upon competition, and that against contracts in restraint of trade, been extended much beyond its proper scope, often with mischievous results.²¹

§ 181. **Class legislation.**—In addition to the provision already considered, a State is forbidden by the Fourteenth Amendment to “deny to any person within its jurisdiction the equal protection of the laws.” This includes denying to any person or class of persons the protection of the laws that is enjoyed by other persons or classes in the same place and under the same circumstances.²² Such protection is denied in case of a penal statute making an arbitrary classification of those subject to its provisions, thus in case of the provision that has appeared in several anti-trust acts excepting from the provisions of such act “agricultural products or live stock while in the hands of producer or raiser.”²³

¹⁷ See c. XIV.

¹⁸ See § 167.

¹⁹ See § 164.

²⁰ See § 163.

²¹ See § 160.

²² *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559; 22 Supm. 431, 439; 46 L. Ed. 679 (1902).

²³ Thus, in the Illinois act held unconstitutional in *Connolly v. Union Sewer Pipe Co.*, supra. See § 209. And so held of the Georgia act. See § 207. For instances of other acts doubtless unconstitutional on the same ground, see under Ind. (§ 210); La. (§ 214); N. C.

(§ 225); compare under Mich. (§ 217); Mont. (§ 221); Tenn. (§ 231); Tex. (§ 232).

As to exemption of combinations relating to wages, see under Ill. (§ 209); La. (§ 214); Minn. (§ 218); Mont. (§ 221); N. C. (§ 225); Wis. (§ 235). That an act is unconstitutional because of such

exemption, see under Neb. (§ 222); 2 Eddy on Combinations, §§ 910, 912. Compare as to effect of Iowa statute, § 211. As to legislation especially applicable to fire insurance, see *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401; 26 Supm. 66; 50 L. Ed. 246 (1905).

CHAPTER XIX

FEDERAL LEGISLATION

- § 182. The Federal anti-trust act of 1890, generally.
- 183. Constitutional basis of act.
 - 184. Commerce as transportation.
 - 185. Commerce as "among the several States."
 - 186. Commerce as "with foreign nations."
 - 187. Commerce in, from or to Territory or District of Columbia.
 - 188. Trade as distinguished from commerce.
 - 189. Transportation and other transactions within State, e. g., manufacture and sale.
 - 190. Transaction within State, when included as incident of other acts.
 - 191. Other transactions than restrictions upon competition, e. g., action of employees.
 - 192. The same; contracts in restraint of trade.
 - 193. Substantial control of transportation as test of legality.
 - 194. Reasonableness as test of legality.
 - 195. Combination as element of illegality.
 - 196. Acts of corporation.
 - 197. Contract, etc., among those engaged in transportation, e. g., by railroad.
 - 198. Contract, etc., among those not engaged in transportation, e. g., those engaged in production or sale.
 - 199. The same; necessity that contract, etc., directly affect trade or commerce.
 - 200. Penal liability.
 - 201. Injunction.
 - 202. Forfeiture, etc., of property.
 - 203. Action for damages.

§ 182. **The Federal anti-trust act of 1890, generally.**—The most conspicuous instance of legislation against restrictions upon competition is what is commonly known as the Federal anti-trust act,¹ which contains the following two distinct prohi-

¹ Act of July 2, 1890, c. 247 (26 Stat. L. 209) (entitled "an act to protect trade and commerce against unlawful restraints and monopolies"). The act was held in *Re Greene*, 52 Fed. 104, 112 (C. C. Ohio, 1892), not to be retroactive, or to have any *ex post facto* opera-

bitions: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."² "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

tion. In *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. 58, 77; 7 C. C. A. 15, 81; 24 L. R. A. 73, 87 (8th C., 1893); *Greer v. Stoller*, 77 Fed. 1 (C. C. Mo., 1896), it was held, as a penal statute, to be subject to the rule of strict construction. See, however, *Northern Securities Co. v. U. S.*, 193 U. S. 197, 358; 24 Supm. 436, 465; 48 L. Ed. 679 (1904); also opinion of Holmes, J. (193 U. S. 402; 24 Supm. 468); *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869, 878 (C. C. Mich., 1907). In *Greer v. Stoller*, supra, the remedies created by the act were said to be "exclusive of all others." But such remedies do not take away the right of one against whom it is sought to enforce an agreement that is in violation of the act, to set up such illegality by way of defense. *Bement v. National Harrow Co.*, 186 U. S. 70, 88; 22 Supm. 747, 754; 46 L. Ed. 1058 (1902). As to whether the provisions of the act may be enforced in a State court, see *Getz v. Federal Salt Co.*, 147 Cal. 115; 81 Pac. 416; 109 Am. St. Rep. 114 (1905); *People ex rel. v. American Tobacco Co.*, 2 Chicago L. J. Weekly, 249 (Cook Co. Cir. Ct. 1897?); *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 466; 60 S. W. 91, 108; 51 L. R. A. 151, 170; 81 Am. St. Rep. 368 (1901); *Locker v. American Tobacco Co.*, 121 App. D. 443; 106 N. Y. Suppl. 115 (1907); *Post v. Railroad*, 103 Tenn.

184, 226; 52 S. W. 301, 311; 55 L. R. A. 481, 492 (1899). Compare *Moore v. U. S.*, 85 Fed. 465; 29 C. C. A. 269 (8th C., 1898). As to necessity of pleading defense based on act, see *N. Y. Bank Note Co. v. Kidder Press Manuf. Co.*, 192 Mass. 391; 78 N. E. 463 (1906).

As to application of act to State laws regulating pilotage, see *Olsen v. Smith*, 195 U. S. 332, 344; 25 Supm. 52, 55; 49 L. Ed. 224 (1904); to rights under patents, etc., §§ 112, 148. As to effect of violation upon right to relief against infringement of patent, see *General Electric Co. v. Wise*, 119 Fed. 922, 924 (C. C. N. Y., 1903). In *Lowenstein v. Evans*, 69 Fed. 908 (C. C. S. C., 1895), the act was held inapplicable to the monopoly of the liquor traffic by the State of South Carolina under a statute of that State; in *Pastor v. N. Y. & Porto Rico S. S. Co.*, 3 Porto Rico, 95 (1907), to exclusive employment by a steamship carrier of a lighter company for reception and delivery of freight.

See generally, as to act, articles in 16 Harv. Law Rev. 178 (1902-3) by W. F. Dana; Id. 539 by C. C. Langdell; 8 Columbia Law Rev. 452 (1908) by E. P. Wheeler; 18 Yale Law Jour. 311 (1908) by J. H. Benton; also article on "Possible Federal Trust Legislation" in 7 Columbia Law Rev. 93 (1907) by W. C. Noyes.

² § 1.

person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor.”³

§ 183. **Constitutional basis of act.**—By the Federal constitution power is conferred upon Congress to “regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” In the exercise of such power Congress may legislate against restrictions upon competition; in other words, prescribe for such commerce “the rule of free competition.”⁴ It is by way of exercise of such power that the Federal anti-trust act is said to have been enacted.⁵ As will hereafter be seen, the act applies, not only to what are strictly restrictions upon competition, but to other acts within the broad description of “restraint of trade or commerce.” There seems no reason to doubt, however, that even as to such acts outside of the description of “restrictions upon competition” the act is within the authority conferred by the commerce clause.

§ 184. **Commerce as transportation.**—It follows from the terms of the commerce clause, as well as from those of the act itself, that the scope of the act is limited to *commerce*. It becomes, therefore, of the utmost importance to determine precisely what is *commerce*, as the term is here used, and much of the confusion and uncertainty involved in the application of the act results from absence of clear conception on this point. In its ordinary signification, indeed, justified by its etymology, *commerce* seems to not only comprehend, but to be confined to, cases of *exchanges* of property, of which the great majority are

³ As to whether under § 2 the existence of mere power of control is sufficient, whether “performance, as well as power of performance should be considered,” and “the elements of oppression and coercion should be shown to exist,” see *U. S. v. American Tobacco Co.*, 164 Fed. 700, 721 (C. C. N. Y., 1908).

⁴ Cooke on the Commerce Clause, § 35; see § 178, *supra*.

⁵ *Northern Securities Co. v. U. S.*, 193 U. S. 197, 335; 24 Supm. 436, 456; 48 L. Ed. 679 (1904); *Re Charge to Grand Jury*, 151 Fed. 834 (D. C. Ga., 1907); *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, 152 Fed. 864; 81 C. C. A. 658; 10 L. R. A. N. S. 972 (3d C., 1907).

sales. It requires, however, but a superficial examination of the authorities to discover that the word, as used in the commerce clause, has radically departed from such signification, inasmuch that it seems to have no necessary reference whatever to mere sales. Perhaps the following definition is the one most approved: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."⁶ But this loosely worded definition seems to us entirely inadequate, as an examination of the authorities will reveal that commerce, in the sense now considered, but partially and imperfectly comprehends *intercourse*, and does not necessarily comprehend *traffic* at all, or the "purchase, sale and exchange of commodities." The important point to note is that commerce, in the sense now considered, *essentially consists in transportation*, clearly including the transportation of persons and property, at least tangible property generally. The scope of what is included, in addition to persons and tangible property, may not yet be clearly defined, but

⁶ *County of Mobile v. Kimball*, 102 U. S. 691, 702; 26 L. Ed. 238 (Oct., 1880). This was approvingly quoted in *McCall v. California*, 136 U. S. 104; 10 Supm. 881; 34 L. Ed. 391 (1890); *Williams v. Fears*, 179 U. S. 270; 21 Supm. 128; 45 L. Ed. 186 (1900); *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 351; 23 Supm. 321, 325; 47 L. Ed. 492 (1903). To like effect, *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 241; 20 Supm. 96, 107; 44 L. Ed. 136 (1899); *U. S. v. American Tobacco Co.*, 164 Fed. 700, 712 (C. C. N. Y., 1908).

A somewhat confused conception of "commerce" would seem indicated by the following statement of the court in *Swift v. U. S.*, 196 U. S. 375, 398; 25 Supm. 276, 280; 49

L. Ed. 518 (1905): "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." As elsewhere pointed out (see § 190), the question involved in *Swift v. U. S.* was whether a transaction might not be within the scope of the act, being regarded as an incident of other acts. As to application of original package doctrine to commerce within the scope of the act, see *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252 (C. C. Cal., 1898). As to sale by traveling salesman, followed by transportation out of State, also as to effect of where title passes, see *U. S. v. American Tobacco Co.*, 164 Fed. 700, 708, 713 (C. C. N. Y., 1908).

there is certainly included the transmission of intelligence under certain conditions. We therefore submit the following definition of commerce as the term is used in the commerce clause: "Commerce consists in transportation (not necessarily all transportation, but certainly) including transportation of persons, tangible property, and (at least under certain conditions) of intelligence."⁷ In brief, so far as we are here concerned, *commerce is transportation*. This, then, is the pole star to guide us in considering in detail the scope of the application of the act. It is to transportation by railroad that the commerce clause is now most conspicuously applied, but it is equally applicable to other means of transportation, as bridges, ferries and vessels;⁸ so, too, transmission of intelligence by telegraph or telephone.⁹

§ 185. **Commerce as "among the several States."**—Commerce as "among the several States" consists in transportation from a point within a given State to a point within another, the length of the distance of either of the terminal points from the boundary line of the State being obviously immaterial. It makes no difference that such terminal points are not in adjoining States, that is to say, the route of transportation passing over other territory than that of the respective States.¹⁰

§ 186. **Commerce as "with foreign nations."**—Commerce as "with foreign nations" consists in transportation from a point within a given State to a foreign nation, and vice versa.¹¹

§ 187. **Commerce in, from or to Territory or District of Co-**

⁷ See Cooke on the Commerce Clause, §§ 4 et seq., for a fuller statement of the views expressed in the text, with supporting authorities.

⁸ See Cooke on the Commerce Clause, § 10.

⁹ See Cooke on the Commerce Clause, § 12. Although the word "transmission" is doubtless more appropriate than "transportation," as applied to communication by telegraph or telephone, the latter is

here employed for the sake of uniformity.

¹⁰ Cooke on the Commerce Clause, § 22.

¹¹ Cooke on the Commerce Clause, § 29. In *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251 (C. C. A., 2d C., 1908), reversing 149 Fed. 933 (C. C. N. Y., 1907), the act was held applicable to a combination among carriers in restraint of foreign trade and commerce, it being held immaterial that the combina-

lumbia.—The act contains a prohibition against “every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations.”¹²

§ 188. **Trade as distinguished from commerce.**—Although the prohibition of the act is directed in terms against a “restraint” or monopoly, not merely of “commerce,” but of “*trade* or commerce,” the terms are probably to be regarded as “practically synonymous.”¹³ The term “trade” crept in without much consideration, it would seem, as part of the ancient phrase “contract in restraint of trade.” If, however, there is any distinction, the term “trade” is probably to be regarded as of narrower scope than “commerce,” as necessarily involving the idea of an exchange or sale, whereas, as already seen, commerce, in the sense now under consideration, does not.¹⁴ But on this suppo-

tion was formed in a foreign country. See act of Aug. 27, 1894, c. 349, §§ 73–77 (28 Stat. L. 570), confined to importations from foreign countries; *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242; 74 C. C. A. 462 (8th C., 1906).

¹² § 3. See *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; 28 Supm. 572; 52 L. Ed. 865 (1908); *Moore v. U. S.*, 85 Fed. 465; 29 C. C. A. 269 (8th C., 1898). In *Leonard v. Abner-Drury Brewing Co.*, 25 App. D. C. 161 (1905), was allowed relief against the execution of the objects of what was said to be a conspiracy in restraint of trade, illegal under § 3, but “equally violative of the common law.” See § 164. In *Tribolet v.*

U. S., 95 Pac. 85; 16 L. R. A. N. S. 223 (Supm. Ct. Ariz., 1908), § 3 was held applicable to combination, etc., in a particular city, though not “in or throughout the Territory.” As to anti-trust act of Oklahoma Territory, see § 228. As to application of act to Porto Rico, see *Peck Steamship Co. v. N. Y. & Porto Rico S. S.*, 2 Porto Rico, 109 (1906); *Pastor v. N. Y. & Porto Rico S. S. Co.*, 3 Id. 95 (1907).

¹³ So held in *U. S. v. Patterson*, 55 Fed. 605, 639 (C. C. Mass., 1893).

¹⁴ In *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252, 265 (C. C. Cal., 1898), the word “commerce” was declared to have a broader meaning, the court saying: “Commerce

sition the narrower signification of "trade" would undoubtedly be without effect to limit the scope of "commerce" as already stated.

§ 189. **Transportation and other transactions within State, e. g., manufacture and sale.**—The scope of the act being, then, limited to commerce "among the several States" or "with foreign nations," there is, as a rule, excluded transportation between points both within a given State;¹⁵ also other transactions carried on wholly within the State, such as sale and manufacture.¹⁶

among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities." To same effect, U. S. v. Cassidy, 67 Fed. 698, 705 (D. C. Cal., 1895); Re Grand Jury, 62 Id. 840 (D. C. Cal., 1894); Re Grand Jury, Id. 834 (D. C. Cal., 1894); U. S. v. Debs, 64 Fed. 724, 749 (C. C. Ill., 1894).

¹⁵ See The Charles E. Wiswall, 86 Fed. 671; 30 C. C. A. 339; 42 L. R. A. 85 (2d C., 1898). As to transportation between points both in State, but over route partly outside, see Cincinnati, Portsmouth, etc., Packet Co. v. Bay, 200 U. S. 179; 26 Supm. 208; 50 L. Ed. 428 (1906). In Swift v. U. S., 196 U. S. 375, 400; 25 Supm. 276, 281; 49 L. Ed. 518 (1905; for facts see § 190), it was said: "We do not mean to imply that the rule which marks the point at which State taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States. Nor do we mean to intimate that the

statute under consideration (i. e., the Federal anti-trust act) is limited to that point."

¹⁶ In U. S. v. E. C. Knight Co., 156 U. S. 1; 15 Supm. 249; 39 L. Ed. 325 (1895); affirming 60 Fed. 934; 9 C. C. A. 297; 24 L. R. A. 428 (3d C., 1894); 60 Fed. 306 (C. C. Pa., 1894), the prohibition of the act was held not to include the mere *acquiring* of certain manufacturing plants, all within a single State, though it was conceded that the result would be to give the purchaser a practical monopoly of manufacture within the United States. Compare Pennsylvania Sugar Refining Co. v. American Sugar Refining Co., 166 Fed. 254 (C. C. A., 2d C., 1908; see § 198) involving a similar state of facts, where, however, the act was held applicable. The act was held not to apply in Merz Capsule Co. v. U. S. Capsule Co., 67 Fed. 414 (C. C. Mich., 1895), where the agreement in question was among parties doing business in *different States*. So in Robinson v. Suburban Brick Co., 127 Fed. 804; 62 C. C. A. 484 (4th C., 1904); Davis v. Booth, 131 Fed. 31; 65 C. C. A. 269 (6th C., 1904); modifying Booth v. Davis, 127 Fed. 875 (C. C. Mich., 1904). See also Dueber Watch-Case Manuf. Co. v.

Thus the act would not apply to a mere monopoly of transportation between Albany and Buffalo, or to a mere monopoly of the manufacture and sale of a given article, even though manufactured and sold in every State. But the rule excluding transactions carried on wholly within the State seems in practical effect of but limited scope. That is to say, although it is held to apply notwithstanding that such sale or manufacture is of an article intended for transportation to a point outside of the State,¹⁷ yet, as will presently be seen, its application is in practice extensively modified, even if not nullified, by the operation of the rule presently to be considered giving the act effect as to transactions within the State regarded as incidents of other acts; also the rule giving it effect as to contracts, etc., among those not engaged in transportation.

§ 190. **Transaction within State, when included as incident of other acts.**—It has just been pointed out that though in theory

Howard Watch & Clock Co., 66 Fed. 637, 642; 14 C. C. A. 14, 19 (2d C., 1895); *Re Greene*, 52 Fed. 104, 112 (C. C. Ohio, 1892); *Bishop v. American Preservers' Co.*, 105 Fed. 845 (C. C. Ill., 1900); *Walsh v. Dwight*, 40 App. D. 513; 58 N. Y. Suppl. 91 (1899). For a vigorous criticism of the decision in *U. S. v. E. C. Knight Co.*, see article in 1 Va. Law Reg. 709 (1896) by Jackson Guy. See also reply in 2 Id. 160 (1896) by John Hunter.

See generally, as to application of rule denying applicability of act to mere manufacture or sale, *Northern Securities Co. v. U. S.*, 193 U. S. 197, 331; 24 Supm. 436, 455; 48 L. Ed. 679 (1904); *U. S. Tobacco Co. v. American Tobacco Co.*, 163 Fed. 701 (C. C. N. Y., 1908); *Albers Commission Co. v. Spencer*, 205 Mo. 105; 103 S. W. 523; 11 L. R. A. N. S. 1003 (1907); *Locker v. American Tobacco Co.*, 121 App. D. 443; 106 N. Y. Suppl. 115

(1907); *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642; 47 S. E. 247; 65 L. R. A. 342; 104 Am. St. Rep. 1013 (1904); *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 519; 56 S. E. 264, 268; 10 L. R. A. N. S. 268, 279; 116 Am. St. Rep. 901 (1907); *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352; 56 N. W. 864; 39 Am. St. Rep. 902 (1893).

In *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 247; 20 Supm. 96, 109; 44 L. Ed. 136 (1899), where the prohibition of the act was held to apply to the combination in question (see § 198), it was held not to apply to such parties thereto as resided and carried on business in the State where delivery under any particular contract was to be made.

¹⁷ *U. S. v. E. C. Knight Co.*, supra (156 U. S. 13; 15 Supm. 254).

the act has no application to transactions carried on wholly within a State, the application of this rule is in practice extensively modified by two rules, one of which we shall now consider. It seems established that a transaction that, considered by itself, is carried on wholly within the State, and hence is not within the scope of the act, may yet be within its scope, being regarded as an incident of other acts that, even considered by themselves, are within its scope. Thus, though a sale, considered by itself, is not within the scope of the act, yet the seller or buyer may stand in such a relation to transactions that are within such scope, that, for the purpose of applying the act, the sale cannot be dissociated from such transactions. In view of the increasing complexity of commercial transactions, it seems impracticable to lay down a very definite rule as to when a sale or other transaction within the State is thus to be regarded as within the scope of the act, and the determination of the question must largely depend on the circumstances of the particular case.¹⁸ In practice it may sometimes be difficult to distinguish

¹⁸ In *Hopkins v. U. S.*, 171 U. S. 578; 19 Supm. 40; 43 L. Ed. 290 (1898); reversing *U. S. v. Hopkins*, 82 Fed. 529 (C. C. Kan., 1897), there were held not within the scope of the act the methods of conduct of business of commission merchants buying and selling live stock, notwithstanding that "the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories." In *Swift v. U. S.*, infra (196 U. S. 397; 25 Supm. 280), it was said that all that was decided in *Hopkins v. U. S.*, was that "the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not, like the defendants before us, themselves the buyers and sellers. They only fur-

nished certain facilities for the sales." In *Anderson v. U. S.*, 171 U. S. 604; 19 Supm. 50; 43 L. Ed. 300 (1898), there were held not within the scope of the act rules of an association or "exchange" of dealers or "yard traders" at stock yards, though not, as in *Hopkins v. U. S.*, mere commission merchants. The effect of this decision was thus stated in *Swift v. U. S.*, infra (196 U. S. 397; 25 Supm. 280): "The defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or to recognize yard traders, who were not members of their association. Any yard trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case." Compare under *Mo.* (see § 220) *State v.*

this rule in its application from the rule elsewhere considered giving the act scope as to contracts, etc., in restriction upon competition within the scope of the commerce clause.¹⁹ Indeed, for many purposes, such rules may doubtless be regarded as identical.

§ 191. Other transactions than restrictions upon competition,

Kansas City Live Stock Exchange, 211 Mo. 181; 109 S. W. 675 (1908).

In *Hopkins v. U. S. and Anderson v. U. S.*, the particular situation of the yards, partly in each of two States, was held to make no difference with reference to the application of the act.

The distinction between *Hopkins v. U. S. and Anderson v. U. S.*, on the one hand, and *Swift v. U. S.*, 196 U. S. 375; 25 Supm. 276; 49 L. Ed. 518 (1905); affirming *U. S. v. Swift*, 122 Fed. 529 (C. C. Ill., 1903), on the other, is a somewhat narrow one. In *Swift v. U. S.* the transactions held within the act were those of persons engaged in the business of buying live stock at stock yards, slaughtering it (such buying and slaughtering being in different States) and converting it into meat which they sold. Such transactions were as follows: They combined to require their purchasing agents at the stock yards (the stock purchased being produced and owned principally in other States and shipped to the yards for sale) to refrain from bidding against each other in good faith; also to bid up the prices of live stock, thereby inducing stock owners in other States to make shipments to their disadvantage; also to fix and maintain prices to dealers directly, and by restricting shipments, by imposing penalties for deviations, by estab-

lishing a uniform rule for giving credit to dealers by notifying one another of the delinquencies of such dealers, and keeping a blacklist of delinquents and refusing to sell to them; also to make uniform charges for cartage, for delivery of meats; also to make exclusive arrangements by means of rebates and other devices for less than lawful rates of railroad transportation. It was here recognized that *U. S. v. E. C. Knight Co.*, 156 U. S. 1; 15 Supm. 249; 39 L. Ed. 325 (1895) and the case at bar were "near to each other," but the former was distinguished (196 U. S. 397; 25 Supm. 279) as a case "where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State," while "here the subject matter is sales, and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales."

See also, as to when a sale "ceases to be a mere transaction in the State . . . and becomes part of a purpose which, when carried out, amounts to and is a contract or combination" within the prohibition of the act, *Montague v. Lowry*, 193 U. S. 38; 24 Supm. 307; 48 L. Ed. 608 (1904).

As to applicability of act to boycott, see § 191.

¹⁹ See § 198.

e. g., action of employees.—Although the act is doubtless primarily directed against restrictions upon competition, its application, as it has been interpreted, is by no means confined to such. The prohibition against “monopolizing or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize,” may doubtless be regarded as confined in its scope to restrictions upon competition. But it is otherwise as to the prohibition against “every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce.”²⁰ Speaking generally, employees, whether acting singly or in combination, are neither engaged in transportation, nor do they as manufacturers or sellers cause articles to be transported. It is difficult to see under these conditions how any action of theirs can result in what is strictly a monopoly of transportation, or a restriction upon competition therein. But under the broader prohibition their action may well result in, at any rate, it has been interpreted as resulting in a “*restraint of trade or commerce*”; that is, a restraint of, perhaps more accurately described as a diminution of, transportation. Thus a strike or boycott may result in an employer transporting less than he otherwise would. Even in this view, there would seem to be plausible ground for contending that the action of the employees does not *directly* result in any restraint or diminution of transportation. It is the action of the employer that *directly* produces that result, the action of the employees being merely indirect as inducing the action that does have the direct

²⁰ It scarcely seems true as said in *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 462; 60 C. C. A. 290, 298; 64 L. R. A. 689, 699 (8th C., 1903), that “the purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive similar interpretations.” In *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774 (C. C. Ky., 1908), it

was said that the two sections “make illegal two different, though nearly allied, things.”

Probably some of the instances elsewhere considered under the head of “*restrictions upon competition* as resulting from contract,” etc. (see § 198), are in reality properly to be regarded as mere “*restraints of trade or commerce*” that are outside of the narrower class of “*restrictions upon competition*.”

effect. But the settled rule seems otherwise.²¹ It would seem that such application of the act to the action of employees might be prevented by confining the scope of the act to what are strictly restrictions upon competition.

§ 192. **The same; contracts in restraint of trade.**—The circumstance just considered that although the act is primarily directed against restrictions upon competition, its application is by no means confined to such, doubtless resulted, in part at least, from the adoption by the framers of the act of what we have elsewhere characterized as the erroneous view that the doctrine against restrictions upon competition is based on that against

²¹ In *Loewe v. Lawlor*, 208 U. S. 274, 293; 28 Supm. 301, 303; 52 L. Ed. 488 (1908), the act was applied in allowing relief to manufacturers largely engaged in interstate trade, against an extensive boycott instituted by labor unions for the purpose of compelling the exclusive employment of union labor. Such boycott was directed not only against such manufacturers, but those purchasing or dealing in their products. It was here said: "The act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business." Here was reversed 148 Fed. 924 (C. C. Conn., 1906); see previous decision in 142 Fed. 216 (C. C. Conn., 1905). So in *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 994; 26 L. R. A. 158 (C. C. La., 1893), the act was applied in what was characterized by the court as an effort by labor unions to intimidate and overawe others who were at work in conducting or carrying on the business of the country. So in *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62

Fed. 803, 821 (C. C. Ohio, 1894), it was applied to a boycott. To like effect, *U. S. v. Elliott*, 62 Fed. 801 (C. C. Mo., 1894); 64 Fed. 27 (C. C. Mo., 1894); *U. S. v. Agler*, 62 Fed. 824 (C. C. Ind., 1894); *U. S. v. Debs*, 64 Fed. 724 (C. C. Ill., 1894); *U. S. v. Cassidy*, 67 Fed. 698, 705 (C. C. Cal., 1895). See also *Buck's Stove & Range Co. v. American Federation of Labor*, 36 Wash. Law Rep. 822, 833 (Supm. Ct. D. C., 1908). The question of such application of the act had been left open in *Arthur v. Oakes*, 63 Fed. 310, 329; 11 C. C. A. 209, 228; 25 L. R. A. 414, 433 (7th C., 1894). So in *Re Debs*, 158 U. S. 564, 600; 15 Supm. 900, 912; 39 L. Ed. 1092 (1895), where the decision was based on the general power of a court of equity, independently of statute, to restrain, on the application of the government, interference with interstate commerce and the transportation of the mails. See also *Wabash R. Co. v. Hannahan*, 121 Fed. 563, 567 (C. C. Mo., 1903). See on the general subject, articles in 40 *Am. Law Rev.* 196 (1906) by J. W. Bryan; 6 *Mich. Law Rev.* 609 (1908) by J. C. Knowlton.

contracts in restraint of trade. And the act well illustrates what has been already stated that "a serious result of the failure to observe the distinction is seen in statutory prohibitions intended to include restrictions upon competition merely, but actually including such contracts in restraint of trade as in no sense constitute restrictions upon competition."²² Thus the question has arisen whether "contracts in restraint of trade or commerce" do not include the ordinary contract of, for instance, a seller not to engage in business. Certainly they are within the provision of the act as literally interpreted, though excluded therefrom by what seems to be in effect judicial legislation by way of repeal *pro tanto*.²³

§ 193. Substantial control of transportation as test of legal-

²² See *U. S. v. Chesapeake & O. Fuel Co.*, 105 Fed. 93, 105 (C. C. Ohio, 1900); affirmed as *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610; 53 C. C. A. 256 (6th C., 1902), where, though the coal and coke affected by the agreement (as to which see § 198) was said to "constitute but a comparatively small amount of that produced by those competing" in the market in question, yet the statute was held to apply as condemning "*every contract which necessarily in its performance involves a restraint of trade*, although it may not extend to the point of a monopoly of all that trade."

²³ That it does not, at least under ordinary conditions, apply to such a contract, seems to follow from *Cincinnati, Portsmouth, etc., Packet Co. v. Bay*, 200 U. S. 179; 26 Supm. 208; 50 L. Ed. 428 (1906; see as to effect of agreement by vendor, here of vessels, to maintain rates). To the same effect, *Brett v. Ebel*, 29 App. D. 256; 51 N. Y. Suppl. 573 (1898); *Bancroft v. Union Embossing Co.*, 72 N. H. 402;

57 Atl. 97; 64 L. R. A. 298 (1903); *Southern Fire Brick Co. v. Sand Co.*, 223 Ill. 616; 79 N. E. 313; 9 L. R. A. N. S. 446 (1906); affirming *Garden City Sand Co. v. Southern Fire Brick & Clay Co.*, 124 Ill. App. 599 (1906). But in *Monongahela River Consolidated Coal & Coke Co. v. Jutte*, 210 Pa. St. 288, 302; 59 Atl. 1088, 1093; 105 Am. St. Rep. 812 (1904), the act was held to apply to such a contract, otherwise sustained on common law grounds as reasonable. Compare *Getz v. Federal Salt Co.*, 147 Cal. 115; 81 Pac. 416; 109 Am. St. Rep. 114 (1905); *Clark v. Needham*, 125 Mich. 84; 83 N. W. 1027; 51 L. R. A. 785; 84 Am. St. Rep. 559 (1900). See also *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 329; 17 Supm. 540, 554; 41 L. Ed. 1007 (1897). In *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122 (6th C., 1898); affirmed in *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211; 20 Supm. 96; 44 L. Ed. 136 (1899); *Shawnee Compress Co. v. Anderson*, 209 U.

ity.—Having thus considered the applicability of the act to other transactions, we shall now confine our attention, generally speaking, to the class of transactions against which it seems to have been primarily directed, that is, restrictions upon competition. Whether it be the prohibition against contracts, etc., “in restraint of trade or commerce,” or that against “monopolizing or attempting to monopolize,”²⁴ it seems a reasonable view that the test of legality of a restriction upon competition is what we have called *the test of extent*,²⁵ that is to say, as here applied, whether there is a substantial control of transportation, thus control of the means of transportation by railroad, for instance, by those engaged therein,²⁶ or control by those engaged in manu-

S. 423; 28 Supm. 572; 52 L. Ed. 865 (1908); *Camors-McConnell Co. v. McConnell*, 140 Fed. 412 (C. C. Ala., 1905); *Reynolds Tobacco Co. v. Allen Bros. Tobacco Co.*, 151 Fed. 819, 823 (C. C. Va., 1907); *U. S. v. American Tobacco Co.*, 164 Fed. 700, 710 (C. C. N. Y., 1908); *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 607; 49 N. E. 1030, 1033; 41 L. R. A. 185, 188; 63 Am. St. Rep. 736 (1898). See under Ill. (§ 209); Mich. (§ 217); Neb. (§ 222); Tex. (§ 232); article in 20 Harv. Law Rev. 167 (1907) by Herbert Pope.

In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U. S. 236; 25 Supm. 637; 49 L. Ed. 1031 (1905), the act was held not to apply to a contract by which a telegraph company receiving from a board of trade quotations of prices on sales for future delivery, was not to furnish them to any bucket shop or place where they might be used as a basis for bets or illegal contracts.

²⁴ It seems clear enough that the word “monopoly,” as used in the act, is to be understood in the modern

sense as applicable to a restriction resulting from the acts of individuals as distinguished from its ancient sense as applicable to a monopoly created by an act of government. See §§ 116, 117. In accord with this view are *American Biscuit Manuf. Co. v. Klotz*, 44 Fed. 721 (C. C. La., 1891); *U. S. v. MacAndrews & Forbes Co.*, 149 Fed. 823, 834 (C. C. N. Y., 1906), and this seems to have been generally assumed, though in some early decisions under the act appeared a disposition to apply the word in its ancient sense. See *Re Corning*, 51 Fed. 205, 210 (D. C. Ohio, 1892); *Re Terrell*, Id. 213 (C. C. N. Y., 1892); *Re Greene*, 52 Fed. 104, 115 (C. C. Ohio, 1892); *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. 58, 82; 7 C. C. A. 15, 86; 24 L. R. A. 73, 89 (8th C., 1893); reversed in 166 U. S. 290; 17 Supm. 540; 41 L. Ed. 1007 (1897).

²⁵ See § 120. Compare language of *Lacombe, J.*, in *U. S. v. American Tobacco Co.*, *infra*.

²⁶ Thus, in *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505; 19 Supm. 25; 43 L. Ed. 259 (1898), the

facture or sale of the supply of a particular article that is transported.²⁷ Applying what has been already stated, there seems to be an unavoidable vagueness incident to the conception of a restriction upon competition illegal according to this test.

agreement held illegal was among 31 different railroad companies forming most (but not all) of the lines engaged in the business of railroad transportation between Chicago and the Atlantic coast.

²⁷ Thus, in *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 236; 20 Supm. 96, 105; 44 L. Ed. 136 (1899), the combination held illegal was practically able to fix prices by controlling two-thirds of the output of cast-iron pipe within certain territory constituting considerably more than three-fourths of that of the United States. In *Montague v. Lowry*, 193 U. S. 38; 24 Supm. 307; 48 L. Ed. 608 (1904); affirming 115 Fed. 27; 52 C. C. A. 621; 63 L. R. A. 58 (9th C., 1902), which affirmed *Lowry v. Tile, Mantel & Grate Assoc.*, 106 Fed. 38 (C. C. Cal., 1900), the agreement held illegal was "formed to unite all acceptable dealers engaged in the tile, grate and mantel business in San Francisco and within a radius of 200 miles therefrom, and all American manufacturers of tiles." So in *Swift v. U. S.*, 196 U. S. 375; 25 Supm. 276; 49 L. Ed. 518 (1905), the combination held illegal was among those who controlled about six-tenths of the trade and commerce in fresh meat among the States and Territories; in *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252 (C. C. Cal., 1898), it was one to fix the price of coal, the parties thereto controlling the supply used in San Francisco for domestic purposes as a fuel; in *Gibbs v. Mc-*

Neeley, 118 Fed. 120; 55 C. C. A. 70; 60 L. R. A. 152 (9th C., 1902), among all the manufacturers and wholesale dealers in the State of Washington, in an article solely manufactured in that State; in *Mines v. Scribner*, 147 Fed. 927 (C. C. N. Y., 1906), among those controlling "90 per cent. of the book business of the country"; in *Continental Wall Paper Co. v. Lewis Voight & Sons Co.*, 148 Fed. 939; 78 C. C. A. 567 (6th C., 1906), among 98 per cent. of the wall paper makers in the United States; in *U. S. v. MacAndrews & Forbes Co.*, 149 Fed. 823 (C. C. N. Y., 1906), among those whose business amounted to 85 per cent. of the whole trade in licorice paste; in *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, 152 Fed. 864; 81 C. C. A. 658; 10 L. R. A. N. S. 972 (3d C., 1907), "between certain wholesalers and jobbers in window glass, alleged to be 75 per cent. of the whole number so engaged in the United States"; in *U. S. v. American Tobacco Co.*, 164 Fed. 700, 719 (C. C. N. Y., 1908), among those producing "70 per cent. of the smoking tobacco made in this country, 73 per cent. of the cigarettes, 81 per cent. of the plug and twist tobacco, 81 per cent. of the fine-cut tobacco, 89 per cent. of the little cigars, and 96 per cent. of the snuff." They also made "95 per cent. of the licorice paste produced, 75 per cent. of the tin foil, and most of the tobacco extracts, boxes and containers." It was also said:

Roughly speaking, it is illegal if resulting in the control by those engaged in transportation, of say 90, or at any rate 95 per cent. of the means of transportation between given points, or the control by those engaged in manufacture and sale of 90 or 95 per cent. of the supply of a particular article transported between such points. A further difficulty seems furnished by the circumstance that a given restriction, in order to be illegal, need not apply to transportation between all possible points. Thus it would seem that a control of the means of transportation by railroad, solely between, say Pittsburg and Chicago, might well be within the prohibition of the act; so of the supply of coal transported between such points. What has already

"The acquisition by the defendants in taking over the various competing plants of most of the well-established and popular brands of tobacco, gives them especial power to control the market. . . . The defendants purchase the major part of all the tobacco leaf—other than that used for cigars—raised in this country. . . . There is only one branch of the industry which they do not have within their grasp—the cigar branch." Their assets amounted to hundreds of millions of dollars. In another opinion (p. 704), the combination in question was described as "consisting of over 60 corporations . . . united into a gigantic combination which controls a greatly preponderating proportion of the tobacco business in the United States in each and all its branches; in some branches the volume being as high as 95 per cent.," the "vast interstate and foreign trade which was formerly carried on by this large number of competing companies and individuals" being now said to be "carried on by one combination." For other instances, see § 120. As to

application of act to the "Standard Oil Company" and subsidiary corporations engaged in restraining and monopolizing commerce in the products of petroleum, see *U. S. v. Standard Oil Co.*, 152 Fed. 290 (C. C. Mo., 1907).

See also *American Biscuit & Manuf. Co. v. Klotz*, 44 Fed. 721 (C. C. La., 1891); *U. S. v. Hopkins*, 82 Fed. 529, 535 (C. C. Kan., 1897); reversed, however, in *Hopkins v. U. S.*, 171 U. S. 578; 19 Supm. 40; 43 L. Ed. 290 (1898); *Loder v. Jayne*, 142 Fed. 1010 (C. C. Pa., 1906); reversed in *Jayne v. Loder*, 149 Fed. 21; 78 C. C. A. 653; 7 L. R. A. N. S. 984 (3d C., 1906).

On the other hand the act has been held inapplicable to agreements to fix price, in the absence of substantial control of the supply of the article in question. See *U. S. v. Nelson*, 52 Fed. 646 (C. C. Minn., 1892); *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 55 Fed. 851 (C. C. N. Y., 1893); 66 Fed. 637, 644; 14 C. C. A. 14, 21 (2d C., 1895).

been said as to the test of extent generally, seems applicable here, that is to say, a rigidly consistent application of such test between all possible points would be practically impossible, or, if possible, in a high degree disastrous. In short, the test is inadequate, being incapable of consistent and logical application.²⁸

§ 194. **Reasonableness as test of legality.**—It has already been stated that, particularly in case of restriction upon competition in business of a public character, there has been manifest a strong tendency to apply what we have called *the test of reasonableness*. This test seems, however, inapplicable under the act, which has been broadly interpreted as applicable to even reasonable restrictions,²⁹ being, as it has been expressed,

²⁸ The impracticability of applying § 2 to "every attempt to monopolize any part of interstate commerce" was well pointed out in *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 462; 60 C. C. A. 290, 298; 64 L. R. A. 689, 699 (8th C., 1903), where it was said: "If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation."

²⁹ Thus, in *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505, 559, 569; 19 Supm. 25, 28, 31; 43 L. Ed. 259 (1898), the act was held applicable to "a contract or combination between competing railroad corporations, entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the

rates and fares thus established are reasonable." This decision might perhaps have been sustained on the ground that the remote, as distinguished from the immediate, effects were illegal. See § 121; 171 U. S. 571; 19 Supm. 32. Or in accordance with the doctrine previously sanctioned by the court that a restriction upon competition by one engaged in a business of a public character is necessarily illegal. See § 132; 171 U. S. 570; 19 Supm. 32.

In *U. S. v. Joint Traffic Assoc.* was reaffirmed *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 327; 17 Supm. 540, 553; 41 L. Ed. 1007 (1897); reversing 58 Fed. 58; 7 C. C. A. 15; 24 L. R. A. 73 (8th C., 1893), and overruling *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 643; 14 C. C. A. 14, 20 (2d C., 1895); *Re Greene*, 52 Fed. 104, 111 (C. C. Ohio, 1892).

The same rule was applied in *Northern Securities Co. v. U. S.*, 193 U. S. 197, 329, 331; 24 Supm. 436, 453, 454; 48 L. Ed. 679 (1904), but see opinion of Brewer, J. (193

"not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature."³⁰ This rule applies not only to those restrictions that result from the acts of those engaged in transportation, but to those that result from the acts of those not thus engaged, thus, those engaged in production or sale.³¹

U. S. 360; 24 Supm. 466); also *Ellis v. Inman*, 131 Fed. 182; 65 C. C. A. 488 (9th C., 1904).

See *Loewe v. Lawlor*, 208 U. S. 274, 297; 28 Supm. 301, 304; 52 L. Ed. 488 (1908); *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; 28 Supm. 572; 52 L. Ed. 865 (1908); *Prescott & Arizona Central R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co.*, 73 Fed. 438 (C. C. N. Y., 1896); *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 278; 29 C. C. A. 141, 147; 46 L. R. A. 122, 128 (6th C., 1898); affirmed in *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 238; 20 Supm. 96, 106; 44 L. Ed. 136 (1899); *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610; 53 C. C. A. 256 (6th C., 1902); *Continental Wall Paper Co. v. Lewis Voight & Sons Co.*, 148 Fed. 939; 78 C. C. A. 567 (6th C., 1906); *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251 (C. C. A., 2d C., 1908).

In *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252, 262 (C. C. Cal., 1898), the rule was held applicable "as well to articles of commerce—the subject of transportation—as it does to the business of transportation itself."

In *U. S. v. Joint Traffic Assoc.* the rule was applied against the objection that such application was in contravention of the Fifth Amendment. See on this point, articles in 11 *Harv. Law Rev.* 80 (1897) by

W. D. Guthrie; 36 *Am. Law Reg. & Rev.* 417 (1897) by P. C. Knox; 7 *Yale Law Jour.* 285 (1898) by E. B. Whitney; 2 *Eddy on Combinations*, §§ 800–5.

As to application of act to restrictions upon assignee or licensee of patent, see *Bement v. National Harrow Co.*, 186 U. S. 70, 92; 22 Supm. 747, 756; 46 L. Ed. 1058 (1902).

³⁰ *Northern Securities Co. v. U. S.*, *supra*.

³¹ See *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252, 262 (C. C. Cal., 1898). In *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, 152 Fed. 864; 81 C. C. A. 658; 10 L. R. A. N. S. 972 (3d C., 1907), the rule was applied against the objection that the combination in question "was only an agreement by which a certain number of wholesalers were to trade exclusively with a certain manufacturer, with the reciprocal understanding that the manufacturer was to sell to no one else, except at a price higher than that paid by the parties to the contract; that this was in effect nothing more than an agreement to sell to one person or to several at a price advantageously lower than the general price, on condition that such person or persons would buy exclusively from the manufacturer so agreeing." It was said by the court that the act "has made, and was intended to make,

§ 195. **Combination as element of illegality.**—In the exercise of the power to prescribe for commerce “the rule of free competition” the prohibition of the act might well have been directed broadly and generally against restrictions upon competition generally, or, to use the language of the act, “restraints of trade or commerce.” That is to say, there might well have been omitted from the act the element of combination as appearing in the prohibition against “every *contract, combination* in the form of trust or otherwise, or *conspiracy*,”³² etc. Such element of combination is, indeed, omitted from the prohibition against “*monopolizing* or attempting to monopolize,” though here again appears the element of combination in the accompanying prohibition against “*combining* or *conspiring*” to monopolize. It would seem that in view of the broad prohibition against “monopolizing or attempting to monopolize,” the act applies to the case of a restriction produced by the acts of a corporation,³³ or

illegal, many sorts of contracts and agreements that prior thereto were not only legal, but were regarded as meritorious and beneficial, and has materially restricted the area within which freedom of contract may be exercised.” So in *U. S. v. American Tobacco Co.*, 164 Fed. 700, 702 (C. C. N. Y., 1908), it was said as to the combination held illegal (see §§ 193, 198): “What benefits may have come from this combination, or from the others complained of, it is not material to inquire, nor need subsequent business methods be considered, nor the effects on production or price.” See as to evidence of benefits. So in another opinion (p. 717): “The combination may not reduce the prices paid to the growers of raw materials, may not increase the prices charged to consumers, may not seek to exclude all others from the field, may be free from coercion or oppression, and yet if it restrict competition, if it restrain trade, rea-

sonably or unreasonably, it falls within the statute.”

³² As to whether there is any distinction between a “contract” and a “combination” or “conspiracy,” as the words are used in this connection, see dissenting opinion of Holmes, J., in *Northern Securities Co. v. U. S.*, 193 U. S. 197, 409; 24 Supm. 436, 471; 48 L. Ed. 679 (1904). It was contended by him that “there is no combination in restraint of trade until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.” See also *Rice v. Standard Oil Co.*, 134 Fed. 464 (C. C. N. J., 1905), where the declaration in an action under § 7 was held defective in failing to observe such distinction. See *Tribolet v. U. S.*, 95 Pac. 85; 16 L. R. A. N. S. 223 (Supm. Ct. Ariz., 1908).

³³ See § 150.

even a mere individual.³⁴ It has already been pointed out that the element of combination is in no sense a necessary incident of an illegal restriction upon competition.³⁵ To include it in the act seems not only unnecessary, but even harmful, as tending to produce confusion as to the proper application of the act.

§ 196. **Acts of corporation.**—In determining the application of the act, it seems, as a rule, immaterial whether the transactions involved are the acts of individuals, or of corporations. Thus the "contract," "combination" or "conspiracy" may be one not only among individuals, but among corporations solely, or among corporations and individuals.³⁶ And, as has just been suggested,³⁷ it would seem that the act applies to a restriction

³⁴ See *U. S. v. MacAndrews, etc.*, Co., 149 Fed. 823, 836 (C. C. N. Y., 1906), where, however, it was said that there is no reason "why any number of persons may not enjoy a monopoly, or may not attempt to monopolize." See also dissenting opinion of Holmes, J., *supra*.

³⁵ See § 129.

³⁶ By § 8 of the act "the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

³⁷ See § 195; *Continental Wall Paper Co. v. Lewis Voight & Sons Co.*, 148 Fed. 939; 78 C. C. A. 567 (6th C., 1906); *McConnell v. Camors-McConnell Co.*, 152 Fed. 321; 81 C. C. A. 429 (5th C., 1907). But hardly in accord with the view expressed in the text seems *Davis v. Booth*, 131 Fed. 31; 65 C. C. A. 269 (6th C., 1904), where a purchase by a corporation was held not within the act, notwithstanding the purchase by it of other like property *to an extent that tend-*

ed to create a power to monopolize the market. It was said: "There is a clear distinction which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination. To this latter class belongs the case of *Merz Capsule Co. v. U. S. Capsule Co.*, 67 Fed. 414 (C. C. Mich., 1895); affirmed in *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787; 19 C. C. A. 108; 31 L. R. A. 415 (6th C., 1896). It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several States of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete." We submit that

produced by the acts of a corporation, that is to say, a single corporation, as well as to those of a mere individual. In view of the plenitude of the power of Congress to prescribe for commerce within the scope of the commerce clause, "the rule of free competition," it is no objection to the application of the act to a given corporation, that it was created under the laws of a State.³⁸

§ 197. Contract, etc., among those engaged in transporta-

this "clear distinction" is utterly unsubstantial, the case being with-in § 2 directed against "every person (including a corporation, under § 8) monopolizing or attempting to monopolize," etc. There was, however, reserved for consideration the effect of the circumstance that payment for the property consisted partly of stock of the purchasing corporation. But in *U. S. v. American Tobacco Co.*, 164 Fed. 700, 718 (C. C. N. Y., 1908), the act was held applicable to a "consolidation of interests, more or less sharply competitive, through the formation of a corporation and the transfer to it of the respective properties and business of such competitors." The distinction stated in *Davis v. Booth*, *supra*, was recognized, it being said: "The testimony in this case shows repeated instances where, upon the transfer of a competing business, the vendors merely changed the form of their investment. They transferred their property and received in exchange stock in the transferee corporation. They exchanged large interests in a small property for small interests in a large property. Instead of standing by themselves, they combined."

See also dissenting opinion of Holmes, J., in *Northern Securities Co. v. U. S.*, *infra*. See article in

9 *Columbia Law Rev.* 95 (1909) by G. F. Canfield.

³⁸ Thus, in *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Supm. 436; 48 L. Ed. 679 (1904), there was held to be no constitutional objection to the application of the act to the organization of a corporation under the laws of a State, by stockholders of competing railroad corporations engaged in commerce within the scope of the commerce clause, the corporation so organized to hold the stock of the constituent corporations. See elaborate dissenting opinion of White, J. (193 U. S. 367; 24 Supm. 473 et seq. So held notwithstanding the 10th Amendment to the Federal Constitution). See also *U. S. v. American Tobacco Co.*, *supra*.

For discussion of effect of decision in *Northern Securities Co. v. U. S.*, see articles in 16 *Harv. Law Rev.* 539 (1902-3); 17 *Id.* 41 (1903-4) by C. C. Langdell; *Id.* 151 by Frederick Pollock; *Id.* 474 by "J. C. G."; *Id.* 533 by Victor Morawetz; 22 *Id.* 114 (1908) by G. C. Todd; 11 *Yale Law Jour.* 387 (1901-2) by E. B. Whitney; 13 *Id.* 57 (1903-4) by D. H. Chamberlain; 1 *Mich. Law Rev.* 251 (1902-3) by H. L. Wilgus; 6 *Id.* 361 (1908) by E. R. Sutherland; 3 *Columbia Law Rev.* 169, 221, 305 (1903) by C. F. Randolph; 4 *Id.* 315 (1904) by G.

tion, e. g., by railroad.—Although, as just seen, the act seems to apply to a restriction produced by the acts of a corporation, or even a mere individual, the element of combination being unnecessary to produce illegality, yet we shall now confine our attention to such restrictions as result from a “contract,” “combination” or “conspiracy.” Such a contract, etc., may, as we shall see, be among either those engaged in transportation, commonly called carriers, or among those not so engaged, thus those engaged in the production or sale of an article that is transported. There scarcely needs pointing out the applicability of the act to such a restriction resulting from a contract, etc., among those engaged in transportation, thus by railroad, “among the several States or with foreign nations.”³⁹

F. Canfield; 7 Id. 582 (1907) by D. W. Brown; 43 Am. Law Reg. N. S. 358 (1904) by H. W. Bikle.

But in *State ex rel. v. Superior Court*, 98 Pac. 739 (Supm. Ct. Wash., 1909), the act was held not to apply to the action of two competing railroad corporations in causing to be incorporated another, each acquiring half its stock.

³⁹ Thus, in *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; 17 Supm. 540; 41 L. Ed. 1007 (1897); *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505; 19 Supm. 25; 43 L. Ed. 259 (1898), the act was held applicable to agreements among competing railroad corporations to establish and maintain rates. So in *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Supm. 436; 48 L. Ed. 679 (1904), to an organization by stockholders of two competing railroad corporations (the Great Northern and Northern Pacific, having substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound) of a “holding” corporation which

should hold the shares of stock of the constituent corporations, such shareholders in lieu of their shares to receive shares in the holding corporation. Such holding corporation became the holder of more than nine-tenths of the stock of one, and more than three-fourths of that of the other of these corporations. There was held to be no constitutional objection to such application of the act. See elaborate dissenting opinion of White, J. For subsequent proceedings, see *Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274; 57 Atl. 876 (1904); *Harriman v. Northern Securities Co.*, 197 U. S. 244; 25 Supm. 493; 49 L. Ed. 739 (1905). A contrary conclusion under the like prohibition of the Minnesota act seems to have been reached in *State v. Northern Securities Co.*, 123 Fed. 692 (C. C. Minn., 1903). To similar effect with *U. S. v. Trans-Missouri Freight Assoc.* and *U. S. v. Joint Traffic Assoc.*, is *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689 (C. C. N. Y., 1901).

See as to decision in *U. S. v.*

§ 198. **Contract, etc., among those not engaged in transportation, e. g., those engaged in production or sale.**—As just stated a restriction upon competition may be the result of a contract, combination, or conspiracy, not among those engaged in transportation, but among those not so engaged, thus those engaged in the production or sale of an article that is transported. It is true, as already seen, that the act has no application to such production or sale, considered by themselves.⁴⁰ But it may well be that, for instance, those engaged in such production or sale enter into a contract, combination, or conspiracy, in restriction upon competition in *transportation* of the article produced or sold.⁴¹

Trans-Missouri Freight Assoc., Stickney's "State Control of Trade and Commerce"; articles in 36 Am. Law Reg. & Rev. 307 (1897) by G. S. Patterson; 3 Va. Law Reg. 163 (1897-8) by W. L. Royall.

In *White Star Line v. Star Line of Steamers*, 141 Mich. 604; 105 N. W. 135; 113 Am. St. Rep. 551 (1905), the act was applied to a combination to create a monopoly in traffic by steamer.

In *Ceballos v. Munson S. S. Line*, 93 App. D. 593; 87 N. Y. Suppl. 811 (1904), it was held not to apply to an agreement between carriers for payment of percentages on freight. The court said: "There was no provision as to maintaining rates or as to preventing competition. Prices were not fixed, dealings were not confined to a combination of persons, nothing tended towards a monopoly."

As to agreement by carriers to give exclusive privilege of transportation, see *Delaware, L. & W. R. Co. v. Kutter*, 147 Fed. 51, 62; 77 C. C. A. 315, 326 (2d C., 1906).

⁴⁰ See § 189.

⁴¹ See *Wheeler-Stenzel Co. v. National Window Glass Jobbers' As-*

soc., *infra*; *U. S. v. American Tobacco Co.*, *infra*. As elsewhere stated (see § 191) probably some of the instances here considered are in reality cases of mere "*restraints of trade or commerce*" that are outside of the narrower class of "*restrictions upon competition*."

That there is no constitutional objection to the application of the act to such contracts, see § 179. In *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290, 342; 17 Supm. 540, 559; 41 L. Ed. 1007 (1897), it was held to apply to a continuance after its passage of an agreement entered into before. In *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211; 20 Supm. 96; 44 L. Ed. 136 (1899); affirming *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271; 29 C. C. A. 141; 46 L. R. A. 122 (6th C., 1898), it was held to apply to a combination that eliminated competition among bidders for contracts involving the sale of an article for delivery within another State and increased prices beyond a reasonable sum. The transaction was held no less one of interstate commerce, because of the seller agreeing to manufacture the article

§ 199. The same; necessity that contract, etc., directly affect trade or commerce.—For the sake of convenience the prohibition against a “contract,” “combination,” or “conspiracy”

in order to fulfil his contract of sale (175 U. S. 246; 20 Supm. 109). Here *U. S. v. E. C. Knight Co.*, 156 U. S. 1; 15 Supm. 249; 39 L. Ed. 325 was distinguished (175 U. S. 240; 20 Supm. 107), as involving “no combination or agreement in terms regarding the future disposition of the manufactured article.” See observations in court below (85 Fed. 295; 29 C. C. A. 165; 46 L. R. A. 138). An action under § 7 against members of the combination here held illegal was held maintainable in *City of Atlanta v. Chattanooga Foundry, etc., Co.*, 127 Fed. 23; 61 C. C. A. 387; 64 L. R. A. 721 (6th C., 1903). See previous decision in 101 Fed. 900 (C. C. Tenn., 1900).

So in *Montague v. Lowry*, 193 U. S. 38; 24 Supm. 307; 48 L. Ed. 608 (1904); affirming 115 Fed. 27; 52 C. C. A. 621; 63 L. R. A. 58 (9th C., 1902), which affirmed *Lowry v. Tile, Mantel & Grate Assoc.*, 106 Fed. 38 (C. C. Cal., 1900); see previous decision in 98 Fed. 817 (1899), it was held to apply to the rules of an association composed not only of local dealers, but of manufacturers in different States, such dealers being forbidden to purchase from a manufacturer not a member of the association, or to sell to one not a member for less than certain prices, the manufacturer being likewise forbidden to sell to one not a member. Here was overruled the objection that the sale of unset tiles was so small in San Francisco as to be a negligible quantity, not amounting to 1 per cent. of the business of the dealers in tiles in

that city. The court said: “The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tiles from the manufacturers are shut out by reason of the association and their non-membership therein, from purchasing their tiles from those manufacturers and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tiles would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members.” So in *U. S. v. Coal Dealers’ Assoc.*, 85 Fed. 252 (C. C. Cal., 1898), the act was held to apply to an agreement between a combination of dealers importing coal from other States and foreign countries, and an association of retail dealers, whereby the business of dealing was regulated and the retail price fixed. Here was applied *U. S. v. Jellico Mountain Coal, etc., Co.*, 46 Fed. 432; 12 L. R. A. 753 (C. C. Tenn., 1891) as “a case entirely in point.” So the act was held to apply in *U. S. v. Chesapeake & O. Fuel Co.*, 105 Fed. 93 (C. C. Ohio 1900); affirmed as *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610; 53 C. C. A. 256 (6th C., 1902), to an agreement among producers of coal and coke for delivery to a common agent for shipment to markets in other States, the sale of such coal and coke to be exclusively

may be treated as if against *contracts* merely. It is impracticable to lay down other than a very general rule as to when a contract among those engaged in production or sale is in re-

by such agent, it (the agent) being prohibited from handling competing coal and coke, and competition among the producers that were parties to the agreement being prohibited; in *Gibbs v. McNeeley*, 118 Fed. 120; 55 C. C. A. 70; 60 L. R. A. 152 (9th C., 1902); reversing 107 Fed. 210 (C. C. Wash., 1901); previous decision in 102 Fed. 594 (C. C. Wash., 1900), to an agreement among manufacturers all residents of the State to "arbitrarily increase the price and diminish the total output," the product in question, though "made only in that State," being "principally bought and used in other States," the agreement containing, however, "no express provision for the transaction of business across State lines," and not by its terms referring to the sale or delivery of the product elsewhere than in the State; in *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 176, 177, 189 (C. C. N. Y., 1905); *Mines v. Scribner*, 147 Fed. 927 (C. C. N. Y., 1906), to an agreement among book publishers not to sell to those "who cut prices"; in *Jayne v. Loder*, 149 Fed. 21; 78 C. C. A. 653; 7 L. R. A. N. S. 984 (3d C., 1906); reversing *Loder v. Jayne*, 142 Fed. 1010 (C. C. Pa., 1906), to like agreement among those variously engaged as wholesale or retail druggists or manufacturers of patent medicines and pharmaceutical supplies; in *Continental Wall Paper Co. v. Lewis Voight & Sons Co.*, 148 Fed. 939; 78 C. C. A. 567 (6th C., 1906), to an agreement among manufacturers co-operating through a corporation organized by them for

the single purpose of selling their product; in *U. S. v. MacAndrews, etc., Co.*, 149 Fed. 823 (C. C. N. Y., 1906) to a combination among producers of licorice paste, it being held sufficient to instance the allotment of certain customers to certain producers by a secret agreement that only the assigned producer would or could supply the needs of the customer. It was said that the producers "have seen to it that their product was followed from factory to consumer, until with their system working perfectly, they not only controlled the source of supply and regulated production, but regulated the consumption of every person in the land who required what they made"; in *McConnell v. Camors-McConnell Co.*, 152 Fed. 321; 81 C. C. A. 429 (5th C., 1907), where *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* was followed; see subsequent decision in *Camors-McConnell Co. v. McConnell*, 163 Fed. 638 (C. C. Ala., 1908); in *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, 152 Fed. 864; 81 C. C. A. 658; 10 L. R. A. N. S. 972 (3d C., 1907), to an agreement among wholesalers and jobbers for arbitrarily fixing price and determining the quantity to be purchased by such wholesalers; in *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869 (C. C. Mich., 1907), to an attempt of a corporation to secure control of another by purchase of its stock as part of a general plan "to secure control of practically the entire output of lake copper"; in *U. S. Tobacco Co. v. American Tobacco Co.*, 163

striction upon competition, that is, "in restraint of trade or commerce." Contracts among those thus engaged are exceedingly various, not only as to their provisions, but as to the manner

Fed. 701 (C. C. N. Y., 1908), to a contract among manufacturers to increase prices and "relating to sales of the product in different States and necessarily to the delivery thereof"; in *U. S. v. American Tobacco Co.*, 164 Fed. 700 (C. C. N. Y., 1908), to a combination among manufacturers of and dealers in tobacco products, it also including producers of materials and supplies. The conditions involved were as thus stated (p. 712): "Leaf tobacco is purchased by the defendants' agents in tobacco markets, or directly from the grower in many different States, and is shipped by means of common carriers to factories or warehouses in other States. Licorice root for making licorice paste, necessary in producing certain kinds of tobacco, is purchased by a subsidiary corporation in foreign countries and is shipped to factories in this country. The paste, when manufactured, is sold to other of the defendants and is shipped to factories in different States. A subsidiary corporation manufactures tin foil and sells and ships it to the different factories. Another does the same thing with boxes, and another with cotton bags. Still another acts strictly as a purchasing corporation, and buys supplies in many markets, and sells and delivers them to the factories, warehouses and offices throughout the country. The record shows constant intercommunication between the members of the combination in different States and constant shipments across State lines from one member to another as

vendor and vendee. The tobacco products manufactured by the defendants are largely sold by traveling salesmen, who solicit orders which, in most instances, are filled by shipping the goods ordered, by means of common carriers, from factories or warehouses located in States other than those in which the orders are taken. A limited number of jobbers in different States are also controlled, as well as an important retailer operating in different States. The business of the defendants covers the whole of the United States and the disposition of their products is effected under the supervision of an office of central authority by constant interstate shipments of the different commodities from factory, warehouse, or branch, to jobber, retailer or consumer." It was said (p. 705) to make no difference that there were individual members not engaged in interstate commerce. See, however (p. 709), as to a corporation (the United Cigar Stores Co.) extensively engaged in retailing cigars and tobacco, "the fact that a corporation, assuming it to have combined with others to restrain trade, invests its money in the business of another corporation (the United Cigar Stores Co.), engaged in selling its goods and those of others fairly to the public," being held insufficient to show a violation of the act by the latter.

See *Park v. National Wholesale Druggists' Assoc.*, 175 N. Y. 1; 67 N. E. 136; 62 L. R. A. 632; 96 Am. St. Rep. 578 (1903), questioned and

in which they affect "trade or commerce."⁴² It is, however, established that the contract, to be within the prohibition of the statute, must be such that its "*direct and immediate effect is a restraint upon*" such trade or commerce,⁴³ that is to say, operates as a restriction upon competition. It is said that the act "must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce, and possibly to restrain it."⁴⁴ It is unnecessary, however, that the *chief* effect of the contract be such restraint,⁴⁵ or that it by its terms refers to such trade or commerce.⁴⁶

distinguished in *Jayne v. Loder*, supra.

In *Bement v. National Harrow Co.*, 186 U. S. 70, 92; 22 Supm. 747, 755; 46 L. Ed. 1058 (1902), it was held that by the act should be determined the validity of an agreement (for manufacture and sale under a patent) providing for manufacture in one State, but for the sale at prices stated of the manufactured articles throughout the United States. See also *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364; 61 C. C. A. 334 (9th C., 1903).

⁴² See decisions cited in § 198.

⁴³ *U. S. v. Joint Traffic Assoc.*, 171 U. S. 505, 568; 19 Supm. 25, 31; 43 L. Ed. 259 (1898); *Hopkins v. U. S.*, 171 U. S. 578, 592; 19 Supm. 40, 45; 43 L. Ed. 290 (1898); *Anderson v. U. S.*, 171 U. S. 604, 615; 19 Supm. 50, 54; 43 L. Ed. 300 (1898); *Union Sewer-Pipe Co. v. Connelly*, 99 Fed. 354 (C. C. Ill., 1900); *Camors-McConnell Co. v. McConnell*, 140 Fed. 412 (C. C. Ala., 1905). Thus, in *Field v. Barber Asphalt Paving Co.*, 194

U. S. 618, 623; 24 Supm. 784, 786; 48 L. Ed. 1142 (1904), the act was held inapplicable to a specification in a municipal contract of material produced only in a foreign country. See *Cincinnati, Portsmouth, etc., Packet Co. v. Bay*, 200 U. S. 179; 26 Supm. 208; 50 L. Ed. 428 (1906); *Heimbuecher v. Goff*, 119 Ill. App. 373 (1905).

That under § 2, the necessary effect of an attempt to monopolize must be to "directly and substantially restrict competition in commerce," see *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 462; 60 C. C. A. 290, 298; 64 L. R. A. 689, 699 (8th C., 1903).

⁴⁴ *Hopkins v. U. S.*, supra (171 U. S. 600; 19 Supm. 48). See also *U. S. v. Joint Traffic Assoc.*, supra; *Whitwell v. Continental Tobacco Co.*, supra.

⁴⁵ *Ellis v. Inman*, infra. Here it was also held that an allegation that the purpose of the combination was to restrain interstate commerce could be taken into consideration in determining whether it came within the prohibition.

⁴⁶ *Gibbs v. McNeeley*, 118 Fed. 120; 55 C. C. A. 70; 60 L. R. A. 152 (9th C., 1902).

§ 200. **Penal liability.**—A violation of the provisions of the act is deemed a misdemeanor, punishable by a fine not exceeding \$5,000, or by imprisonment not exceeding a year, or both, in the discretion of the court.⁴⁷

With regard to the effect of mere refusal to deal, it seems difficult to reconcile *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454; 60 C. C. A. 290; 64 L. R. A. 689 (8th C., 1903), with *Ellis v. Inman*, 131 Fed. 182; 65 C. C. A. 488 (9th C., 1904); reversing 124 Fed. 956 (C. C. Oreg., 1903). In *Ellis v. Inman*, it was denied, but in *Whitwell v. Continental Tobacco Co.*, as asserted that, in determining whether the act applies, it is relevant to inquire whether "the main purpose and chief effect" is "to foster the trade and to increase the business of those engaged in the transaction." In *Whitwell v. Continental Tobacco Co.*, the act was held not to apply to the refusal of a manufacturer to sell at prices that would enable the plaintiff to sell at a profit, unless he refrained from buying, selling or handling the products of competitors of such manufacturer. So held, though concededly "the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of commerce." See *Commonwealth v. Strauss*, 191 Mass. 545; 78 N. E. 136; 11 L. R. A. N. S. 968 (1906), as to application of act to prohibition of Mass. R. L. (1902), c. 56, § 1, against making it a condition of a sale, that the purchaser shall not sell or deal in goods of any other person. So in *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593; 61 C. C. A. 19 (8th C., 1903), the

act was held not to apply to the agreement of the purchaser of a large quantity of cement "not to sell said cement, ship same, or allow same to be shipped" outside of a State.

On the other hand, in *Ellis v. Inman*, 131 Fed. 182; 65 C. C. A. 488 (9th C., 1904); reversing 124 Fed. 956 (C. C. Oreg., 1903), the act was held to apply to a combination to refuse to sell to those purchasing from outside the State, it being held no answer that dealers outside the State were unable to furnish the necessary supply, or that a combination to reduce prices would have had the same effect on interstate trade as did the combination in question. This seems to be one of the instances already alluded to, of "mere restraints of trade or commerce" that are outside of the narrower class of "restrictions upon competition." So far as appears, the members of the combination were not engaged in trade or commerce within the scope of the act, and the restriction upon competition, if any, was solely as to manufacture or sale within the State.

As to agreements by which purchasers were to receive rebates provided they purchased exclusively from the seller, see *Re Corning*, 51 Fed. 205, 211 (D. C. Ohio, 1892); *Re Terrell*, Id. 213 (C. C. N. Y., 1892); *Re Greene*, 52 Id. 104, 117 (C. C. Ohio, 1892).

⁴⁷ See §§ 1, 2, 3 of act. See *Re Greene*, 52 Fed. 104, 111 (C. C.

Ohio, 1892); *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 279;

§ 201. **Injunction.**—The several circuit courts of the United States have jurisdiction to “prevent and restrain violations” of the act, such proceedings to be instituted by “the several district attorneys of the United States in their respective dis-

29 C. C. A. 141, 148; 46 L. R. A. 122, 129 (6th C., 1898). That as a penal statute the act is to be strictly construed, see § 182. See as to requisites of indictment under the act, *U. S. v. Greenhut*, 50 Fed. 469 (D. C. Mass., 1892); *Re Greene*, supra; *U. S. v. Patterson*, 55 Fed. 605, 641; 59 Id. 280 (C. C. Mass., 1893); *U. S. v. Virginia-Carolina Chemical Co.*, 163 Fed. 66 (C. C. Tenn., 1908). It is not sufficient for an indictment to merely follow the words of the act. *U. S. v. Nelson*, 52 Fed. 646 (C. C. Minn., 1892); *U. S. v. Patterson*, 55 Fed. 605, 638 (C. C. Mass., 1893); *Re Greene*, supra. See *Tribolet v. U. S.*, 95 Pac. 85; 16 L. R. A. N. S. 223 (Supm. Ct. Ariz., 1908).

In *Tribolet v. U. S.*, supra, was overruled the objection that an indictment under the act was bad for duplicity “for that three separate and distinct offenses are alleged in the single count of the indictment, namely (1), the making of a contract in restraint of trade and commerce; (2) a combination in form of trust in restraint of trade and commerce; (3) a conspiracy in restraint of trade and commerce and that the statute denounces each of them as a separate and distinct offense.” See also, as to objection of duplicity in indictment, *U. S. v. MacAndrews, etc., Co.*, 149 Fed. 823 (C. C. N. Y., 1906).

In *U. S. v. MacAndrews, etc., Co.*, supra, the offenses of a combination and of a monopoly charged in the same indictment were held

not distinct, so that separate punishment therefor was allowable.

As to necessity that indictment allege means by which combination or conspiracy was to be accomplished, see *Tribolet v. U. S.*, supra.

As to sufficiency of description of combination, see *U. S. v. MacAndrews, etc., Co.*, supra, there being here overruled the objection that the indictment described “only the results and effects of the combination but not the combination itself.” See also as to sufficiency of allegation of time of combination or monopoly; also of description of conspiracy; also as to liability of corporation to indictment for conspiracy, and as to objection of joinder of corporate and individual defendants. Acts of a corporation were held to impose no criminal liability upon stockholders or others interested in the corporation. *Re Greene*, 52 Fed. 104, 112 (C. C. Ohio, 1892). As to issuance and service of process for non-resident corporation, see *U. S. v. Virginia-Carolina Chemical Co.*, 163 Fed. 66 (C. C. Tenn., 1908). As to competency of grand jury to institute and pursue investigation directed to discovery of violation of act, see *Re Hale*, 139 Fed. 496 (C. C. N. Y., 1905). See also, as to proceedings before grand jury, *U. S. v. Virginia-Carolina Chemical Co.*, 163 Fed. 66 (C. C. Tenn., 1908); article in 6 *Columbia Law Rev.* 375 (1906), by H. W. Taft.

By Act of Feb. 25, 1903 (32 Stat. L. 904), “no person shall be prose-

tricts under the direction of the attorney-general.”⁴⁸ Such a proceeding may be by petition.⁴⁹ A “temporary restraining order or prohibition” may be made.⁵⁰ But the right to an injunction under this provision is limited to the government; it

could not be subjected to any penalty for forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution” under the act, with, however, an exception as to perjury. As to application to testimony given before grand jury, see *Re Hale*; article in 6 *Columbia Law Rev.* 375 (1906) by H. W. Taft, *supra*. See also act of June 30, 1906 (34 Stat. L. 798).

⁴⁸ § 4. Injunctions under this provision were allowed in *U. S. v. Elliott*, 62 Fed. 801 (C. C. Mo., 1894); *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; 17 Supm. 540; 41 L. Ed. 1007 (1897); *U. S. v. Coal Dealers' Assoc.*, 85 Fed. 252, 259 (C. C. Cal., 1898); *Swift v. U. S.*, 196 U. S. 375; 25 Supm. 276; 49 L. Ed. 518 (1905; see for form of injunction). Thus, in *U. S. v. Chesapeake & O. Fuel Co.*, 105 Fed. 93 (C. C. Ohio, 1900); affirmed as *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610; 53 C. C. A. 256 (6th C., 1902), an injunction was allowed against selling or shipping into any other State under the agreement held illegal (see § 190), the agreement was declared illegal and void, in so far as affecting interstate trade and commerce, and the combination thereunder dissolved. For forms of injunctions under the act, see also 36 *Am. Law Rev.* 597, 907 (1902).

In *U. S. v. American Tobacco Co.*, 164 Fed. 700 (C. C. N. Y.

1908), issuance of the injunction was suspended until after the decision on appeal, and application for a receiver was denied. In *U. S. v. Debs*, 64 Fed. 724 (C. C. Ill., 1894), the defendant was held guilty of contempt for violating such an injunction. That relief may be obtained against a combination already organized, as well as against one in process of formation, see *Northern Securities Co. v. U. S.*, 193 U. S. 197, 357; 24 Supm. 436, 465; 48 L. Ed. 679 (1904). As to bringing in additional parties, see § 5 of act; which was sustained and applied to non-residents in *U. S. v. Standard Oil Co.*, 152 Fed. 290 (C. C. Mo., 1907). As to application of rule allowing some of numerous parties to be brought in as representing the whole, see *U. S. v. Coal Dealers' Assoc.*, *supra*. As to exemption of witness from penalty or forfeiture, see § 200. By act of Feb. 11, 1903, c. 544 (32 Stat. L. 823), provision is made for giving precedence to a suit in equity under the act; see also as to appeal to Supreme Court.

As to jurisdiction of Supreme Court of District of Columbia to allow injunction, see *Buck's Stove & Range Co. v. American Federation of Labor*, 36 *Wash. Law Rep.* 822, 842 (Supm. Ct., D. C., 1908).

⁴⁹ § 4.

⁵⁰ § 4. In *U. S. v. Coal Dealers' Assoc.*, *supra*, it was intimated that a temporary restraining order may be issued without notice, “under the circumstances sanctioned by the es-

cannot be exercised by a private citizen, his remedy being limited to an action for damages.⁵¹

§ 202. **Forfeiture, etc., of property.**—Provision is made for the forfeiture, seizure and condemnation of "property owned

established usages of equity practice," with a query whether, for the purpose of obtaining such an order, it is necessary to show that irreparable injury will result from delay, the case involving a question of monopoly and restraint of trade.

⁵¹ That is, under § 7. *Blindell v. Hagan*, 54 Fed. 40 (C. C. La., 1893); affirmed as *Hagan v. Blindell*, 56 Fed. 696; 6 C. C. A. 86 (5th C., 1893); *Pidcock v. Harrington*, 64 Fed. 821 (C. C. N. Y., 1894); *Greer v. Stoller*, 77 Id. 1 (C. C. Mo., 1896); *Gulf, Colorado & Santa Fe Ry. Co. v. Miami Steamship Co.*, 86 Fed. 407, 420; 30 C. C. A. 142, 155 (5th C., 1898); *Southern Indiana Express Co. v. U. S. Express Co.*, 88 Fed. 659, 663 (C. C. Ind., 1898); affirmed in 92 Fed. 1022; 35 C. C. A. 172 (7th C., 1899); *Block v. Standard Distilling, etc., Co.*, 95 Fed. 978 (C. C. Ohio, 1899); *Metcalf v. American School Furniture Co.*, 122 Fed. 115, 126 (C. C. N. Y., 1903); *Territory v. Long Bell Lumber Co.*, 99 Pac. 911 (Supm. Ct. Okla., 1908); *Post v. Railroad*, 103 Tenn. 184, 228; 52 S. W. 301, 311; 55 L. R. A. 481, 492 (1899). In *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 71; 24 Supm. 598, 604; 48 L. Ed. 870 (1904), was held unauthorized a proceeding by a State for the alleged purpose of protecting certain of its proprietary interests, that is, by relief against the combination under consideration in *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Supm. 436; 48 L. Ed. 679 (1904),

it being said: "Taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States under § 4 by district attorneys of the United States, acting under the direction of the attorney-general; thus securing the enforcement of the act so far as direct proceedings in equity are concerned, according to some uniform plan operative throughout the entire country." In *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869, 877 (C. C. Mich., 1907), the decisions were discussed at length, and disapproved "so far as they deny the right of a private party, who has sustained special injury by the violation of the anti-trust act, to relief by injunction under the general equity jurisdiction of the court." Accordingly such relief was allowed to a stockholder against an attempt by another corporation to secure control of his corporation by purchase of its stock, as part of a general plan to create a monopoly.

As to whether rule stated in text applies to injury under § 3, see *Leonard v. Abner-Drury Brewing Co.*, 25 App. D. C. 161 (1905). See also as to remedy by dissolution of agreement invalid under act.

under any contract, or by any combination, or pursuant to any conspiracy (and being the subject thereof)," that is, a conspiracy in restraint of trade or commerce among the several States or with foreign nations. But this provision is applicable only when such property is "in the course of transportation from one State to another, or to a foreign country."⁵²

§ 203. **Action for damages.**—A right of action is given to "any person who shall be injured in his business or property"⁵³

§ 6. The proceedings for seizure and condemnation are like "those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law." Held, that property could not be thus forfeited in a proceeding under the statute for an injunction. The court said: "This involves a trial by jury." *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 301; 29 C. C. A. 141, 171; 46 L. R. A. 122, 142 (6th C., 1898); affirmed in *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211; 20 Supm. 96; 44 L. Ed. 136 (1899).

⁵³ In *American Banana Co. v. United Fruit Co.*, 166 Fed. 261 (C. C. A., 2d C., 1908); affirming 160 Fed. 184 (C. C. N. Y., 1908), while it was said to be unnecessary "to aver an injury to an existing business," an action under the act was held not maintainable, there not appearing "an intention and preparedness to engage in business." But in *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, *infra*, it was held to apply, not merely to driving out of business, but to preventing one from engaging in it. The circumstances were held to show "something more than a mere mental intention (of the injured party) to engage in interstate commerce," such party having

undergone large expense with a view to engaging therein. So in *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251 (C. C. A., 2d C., 1908); reversing 149 Fed. 933 (C. C. N. Y., 1907), where it was said to be "as unlawful to prevent a person from engaging in business as it is to drive a person out of business" in sustaining the action (as to which see note 61, *infra*) it was held immaterial "whether the combination was entered into before or after the plaintiffs commenced to do business."

In *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, 152 Fed. 864; 81 C. C. A. 658; 10 L. R. A. N. S. 972 (3d C., 1907; see § 198), was overruled the contention that the word "injured" "is used in a technical sense, and imports an injury as recognized at common law, that is, as a harm inflicted by commission of a wrong or tort"; that § 7, "while it gives a private right of action, does so only where violation of the preceding sections results in a legal injury at common law to the plaintiff, and that nothing in this section can possibly be construed into making such contracts and combinations themselves, wrongs or torts against the person who suffers harm thereby; that it is only where there has been such an injury, some tort or

by any other person or corporation by reason of anything for-

breach of contract resulting from the public offense, that the party injured may recover," etc. Here was explained at length *Mogul S. S. Co. v. McGregor*, App. Cas. (1892) 25.

In *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774 (C. C. Ky., 1908), was sustained on demurrer the petition in an action under § 7, there being admitted by the demurrer "the existence of the illegal combinations and conspiracies to restrain and monopolize interstate trade and commerce." The court said: "The conspiracy and combination, though themselves unlawful, cannot injure any person either in his business or property so as to give him a cause of action under § 7, unless something be done to make the combination and conspiracy effective; but whatever is done by those engaged in the scheme or plot with the motive and intent to carry out the unlawful purpose itself becomes tainted with the illegality of the scheme, however innocent it might otherwise have been, the separate acts becoming thereby so interwoven with the unlawful scheme as to cause the injury 'by reason' of the combination, within the language of § 7. It therefore seems that a series of acts, each of which may be innocent in itself, may be wrongful if the direct object, purpose, and result thereof be to carry into effect a combination agreement whereby the free flow of commerce between the States or the liberty of a trader to carry on his business be obstructed. . . . All the defendants are jointly charged with having entered each of the alleged combinations and conspiracies com-

plained of, and, while one is charged with doing one thing, and one with another, all of these acts, we think, are sufficiently alleged to have been done in pursuance of the common design."

In *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70; 24 Supm. 598, 604; 48 L. Ed. 870 (1904), relief was denied to a State on account of alleged injury to certain of its proprietary interests, that is, against the combination under consideration in *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Supm. 436; 48 L. Ed. 679 (1904). See § 201. The court said: "The injury on account of which the suit was brought is at most only remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a State, by reason of the suppression in violation of the act of Congress of free competition between interstate carriers engaged in business in such State; not such a direct actual injury as that provided for in § 7."

As to action by stockholder, see *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869, 879 (C. C. Mich., 1907); citing *Metcalf v. American School Furniture Co.*, 108 Fed. 909, 912 (C. C. N. Y., 1901).

In *Ames v. American Telephone, etc., Co.*, 166 Fed. 820 (C. C. Mass., 1909) the right of action of a corporation was held not enforceable by a stockholder. In *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, *infra*, a corporation was allowed relief, against the objection that it was a party to the conspiracy, it not being precluded

bidden or declared to be unlawful" by the act.⁵⁴ As already seen, what is forbidden or declared to be unlawful by the act is either a "contract," "combination" or "conspiracy" "in restraint of trade or commerce," or a monopoly or combination

by action by directors in its name, detrimental to its interests and in bad faith.

In *American Banana Co. v. United Fruit Co.*, 160 Fed. 184 (C. C. N. Y., 1908); affirmed in 166 Fed. 261 (C. C. A., 2d C., 1908), was held not maintainable under the act, an action for ejection from real estate in a foreign country, and the seizure of personal property there, the acts complained of being done by the government of such country, nor was any such action held maintainable on account of "enticing or seeking to entice away plaintiff's employees and oppressing or seeking to oppress, such of its own employees as presumed to buy stock in plaintiff's company." So in *Bishop v. American Preservers' Co.*, 105 Fed. 845 (C. C. Ill., 1900), an action was held not maintainable because of a corporation alleged to have been formed in pursuance of an illegal agreement, bringing a replevin suit against the plaintiff and thereby obtaining possession of property of his. So held, however, where the plaintiff was himself a party to the illegal trust combination. See previous decision in 51 Fed. 272 (C. C. Ill., 1892). For other instances of unsuccessful actions brought under the act, see *Lowenstein v. Evans*, 69 Fed. 908 (C. C. S. C., 1895); *Walsh v. Dwight*, 40 App. D. 513; 58 N. Y. Suppl. 91 (1899). Compare *Block v. Standard Distilling, etc., Co.*, 95 Fed. 978 (C. C. Ohio, 1899).

In *Pennsylvania Sugar Refining*

Co. v. American Sugar Refining Co., 166 Fed. 254 (C. C. A., 2d C., 1908); reversing 160 Fed. 144 (C. C. N. Y., 1908), was held maintainable an action for a conspiracy, by means of obtaining control of a corporation, to prevent it from re-engaging in business.

As to injury to trade competitor, see *Peck Steamship Co. v. N. Y. & Porto Rico S. S. Co.*, 2 Porto Rico, 109 (1906).

As to action under § 7, for injury under § 3 (see § 187), see *Leonard v. Abner-Drury Brewing Co.*, 25 App. D. C. 161 (1905).

§ 7. That such provision is within the power of Congress, see *Chattanooga Foundry, etc., Works v. City of Atlanta*, *infra*. The suit is to be brought "in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy." The plaintiff "shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." *Id.*

In *Cilley v. United Shoe Mach. Co.*, 152 Fed. 726 (C. C. Mass., 1907), was held insufficient the declaration in an action under § 7, it being said: "It is not sufficient to frame the declaration in the words of the statute. The statute does not set forth the elements of the offenses which are forbidden; and, further, there may be contracts in restraint of trade between the States or with foreign countries and attempts to monopolize such trade

or conspiracy to monopolize.⁵⁵ It has also been seen that, while the prohibition against monopolizing, etc., may doubtless be regarded as confined in its scope to restrictions upon competition, that against a contract, etc., "in restraint of trade or commerce" is applicable to other transactions than restrictions upon

or commerce, which are not within the statute. These circumstances make it imperative that the substance of the contracts in restraint of trade, or the substantial facts which constitute the attempt to monopolize, should be set forth in the declaration."

The declaration was held sufficient in *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, 152 Fed. 864; 81 C. C. A. 658; 10 L. R. A. N. S. 972 (3d C., 1907).

In *Rice v. Standard Oil Co.*, 134 Fed. 464 (C. C. N. J., 1905), the declaration was struck out under the local practice as irregular and defective. As to pleading stating cause of action under Interstate Commerce Act; also as to statements intended to bring case within scope of anti-trust act, but regarded as surplusage, see *American Union Coal Co. v. Pennsylvania R. Co.*, 159 Fed. 278 (C. C. Pa., 1908).

In *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 66 Fed. 637, 641; 14 C. C. A. 14, 18 (2d C., 1895), a complainant declaring under this act was not allowed to turn the action into a common-law one, for the purpose of claiming jurisdiction over the defendant. A direct action only held authorized, but not a set-off of unliquidated damages, in an action based on a special contract having no direct connection with a restriction upon competition claimed to be

in violation of the act. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 552; 22 Supm. 431, 436; 46 L. Ed. 679 (1902). In *City of Atlanta v. Chattanooga Foundry, etc., Co.*, 127 Fed. 23; 61 C. C. A. 387; 64 L. R. A. 721 (6th C., 1903); affirmed in *Chattanooga Foundry, etc., Works v. City of Atlanta*, 203 U. S. 390; 27 Supm. 65; 51 L. Ed. 241 (1906), an action under § 7 was held not a penal action, but an action on a statute liability, for the purpose of applying the statute of limitations. In the absence of a Federal statute of limitations applicable, the local law of the State was here applied. See previous decision in 101 Fed. 900 (C. C. Tenn., 1900). In *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774 (C. C. Ky., 1908), it was held that a petition in such an action was to be tested not by the rules of pleading in criminal cases, but by local statutory provisions.

As to allowance of attorneys' fees, see *Montague v. Lowry*, 193 U. S. 38; 24 Supm. 307; 48 L. Ed. 608 (1904); exemption of witness from penalty or forfeiture, § 200.

In *Monarch Tobacco Works v. American Tobacco Co.*, supra, was denied a motion to require the petition to be made more definite and certain as to damages.

See as to damages, *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, supra.

⁵⁵ See § 182.

competition, notably action of employees, thus a strike or boycott.⁵⁶ We have then, to begin with, a distinction between an injury resulting from a restriction upon competition and one resulting from a transaction that is not a restriction upon competition. It has also been seen that an illegal restriction upon competition may result either from a contract, etc., among those engaged in transportation; e. g., by railroad,⁵⁷ or from a contract, etc., among those not engaged therein; e. g., those engaged in production or sale.⁵⁸ The rights of action given by the act may then be classified as against (1) those engaged in transactions other than restrictions upon competition; (2) parties to contracts, etc., in restriction upon competition among those engaged in transportation; (3) parties to contracts, etc., in restriction upon competition among those not engaged in transportation. The most conspicuous instance of a right of action against those engaged in transactions other than restrictions upon competition is that of one engaged in transportation, that is, as a carrier, or in causing articles to be transported, that is, as a shipper, against those by whose action transportation is diminished or otherwise interfered with, for instance, employees engaging in a boycott.⁵⁹ But it seems reasonably clear that, in order to possess the right of action given by the act, one need not be either, thus, as carrier, engaged in transportation, or, thus as shipper, in causing articles to be transported.⁶⁰ Thus there may exist against parties to contracts in restriction upon competition a right of action in favor of one compelled to pay a higher price;⁶¹ so in favor of one precluded from purchasing.⁶²

⁵⁶ See § 191.

⁵⁷ See § 197.

⁵⁸ See § 198.

⁵⁹ *Loewe v. Lawlor*, 208 U. S. 274; 28 Supm. 301; 52 L. Ed. 488 (1908; for facts, see § 191).

⁶⁰ *City of Atlanta v. Chattanooga Foundry, etc., Co.*, supra; see pre-

vious decision in 101 Fed. 900, 907 (C. C. Tenn., 1900). See, however, *Dueber Watch-Case Manuf. Co. v. Howard Watch & Clock Co.*, 55 Fed. 851 (C. C. N. Y., 1893).

⁶¹ Thus, in *City of Atlanta v. Chattanooga Foundry, etc., Co.*, 127 Fed. 23; 61 C. C. A. 387; 64 L. R.

⁶² In *Lowry v. Tile, Mantel & Grate Assoc.*, 106 Fed. 38 (C. C.

Cal., 1900); affirmed as *Montague v. Lowry*, 115 Fed. 27; 52 C. C. A.

A. 721 (6th C., 1903), the injury held actionable was the increase of price that a municipal corporation that maintained a system of water works from which it derived a revenue, was compelled to pay for water pipe as a result of fictitious bids. It was held no objection to the maintenance of the action against members of the combination in question, that such corporation had made no purchase from either of the defendants, but from a member of the combination not made a defendant. This was affirmed in *Chatanooga Foundry, etc., Works v. City of Atlanta*, 203 U. S. 390; 27 Supm. 65; 51 L. Ed. 241 (1906), where it was said: "The transaction which did the wrong was a transaction between parties in different States, if that be material." And it was held no objection to recovery that "the sale was not so connected in its terms with the unlawful combination as to be unlawful." So increase of price was the injury held actionable in *U. S. Tobacco Co. v. American Tobacco Co.*, 163 Fed. 701, 711 (C. C. N. Y., 1908). In *Gibbs v. McNeeley*, 118 Fed. 120; 55 C. C. A. 70; 60 L. R. A. 152 (9th C., 1902); reversing 107 Fed. 210 (C. C. Wash., 1901); previous decision in 102 Fed. 594

(C. C. Wash., 1900), an action was held maintainable against manufacturers who agreed to increase the price and diminish the output (see § 198), the action being by one engaged in the business of buying the manufactured article and selling to purchasers in other States, the acts charged interfering with his "contracts to buy, sell or exchange goods to be transported among the several States," contracts made and negotiated between him and his customers in various States.

That damages sustained by the payment of excessive, unjust or unreasonable rates to a carrier are to be recovered under the Interstate Commerce, instead of the anti-trust act, see *Meeker v. Lehigh Valley R. Co.*, 162 Fed. 354 (C. C. N. Y., 1908). But in *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251 (C. C. A., 2d C., 1908); reversing 149 Fed. 933 (C. C. N. Y., 1907), the act was held applicable to a combination among carriers who fixed rates and shut off outside competition by requiring shippers to pay a percentage in addition to a reasonable freight rate, which they should receive back only in case of their refraining from shipping by other lines.

621; 63 L. R. A. 58 (9th C., 1902); affirmed in 193 U. S. 38; 24 Supm. 307; 48 L. Ed. 608 (1904); previous decision in 98 Fed. 817 (1899), an action was held maintainable against the organizers of an illegal association (see § 198) because of a seller having by reason of joining such association, violated the agreement to sell. So an action for refusal to sell was held maintainable in *Ellis v. Inman*, 131 Fed. 182; 65 C. C. A. 488 (9th

C., 1904; see § 199); *Mines v. Scribner*, 147 Fed. 927 (C. C. N. Y., 1906). See *Jayne v. Loder*, 149 Fed. 21; 78 C. C. A. 653; 7 L. R. A. N. S. 984 (3d C., 1906). But in *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 463; 60 C. C. A. 290, 299; 64 L. R. A. 689, 700 (8th C., 1903), an action was held not maintainable for refusal to sell at prices that would enable the plaintiff to sell at a profit. In *American Banana Co. v. United*

Fruit Co., 160 Fed. 184 (C. C. N. Y., 1908); affirmed in 166 Fed. 261 (C. C. A., 2d C., 1908), no cause of action was held furnished by the closing of a market (in a foreign country) to the plaintiff "because

defendant offered higher prices to producers than did anyone else, and so obtained long contracts for the exclusive purchase of their product."

CHAPTER XX

STATE LEGISLATION

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| § 204. Alabama. | § 221. Montana. |
| 205. Arkansas. | 222. Nebraska. |
| 206. California. | 222a. New Hampshire. |
| 206a. Florida. | 223. New Mexico. |
| 207. Georgia. | 224. New York. |
| 208. Idaho. | 225. North Carolina. |
| 209. Illinois. | 226. North Dakota. |
| 210. Indiana. | 227. Ohio. |
| 211. Iowa. | 228. Oklahoma. |
| 212. Kansas. | 229. South Carolina. |
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| 215. Maine. | 232. Texas. |
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| 216a. Massachusetts. | 233a. Virginia. |
| 217. Michigan. | 234. Washington. |
| 218. Minnesota. | 235. Wisconsin. |
| 219. Mississippi. | 236. Wyoming. |
| 220. Missouri. | |

§ 204. **Alabama.**—"Any person or corporation who engages or agrees with other persons or corporations, or enters into, directly or indirectly, any combination, pool, trust or confederation, to regulate or fix the price of any article or commodity to be sold or produced within this State, or any person or corporation who enters into, becomes a member of, or party to, any pool, agreement, combination, or confederation, to fix or limit the quantity of any article or commodity to be produced, manufactured, mined, or sold, in this State," is guilty of a criminal offense.¹ And so is "any corporation chartered under the laws

¹ Crim. Code (1907), § 7579. The punishment here prescribed is a fine of not less than \$500 or more than \$2,000. For similar provisions see under Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Mich. (§ 217); Minn. (§ 218); Miss. (§ 219); Mo. (§ 220);

of this State, or any officer, stockholder, agent, or employee of any such corporation, which enters into any combination with any other corporation or person with the intent to place the management or control of any such corporation in the hands of another corporation or person, and thereby limit or fix the price, restrict or diminish the production, manufacture, sale, use, or consumption of any article of commerce.”² And so is “any person or corporation, domestic or foreign, which shall restrain or attempt to restrain the freedom of trade or production, or which shall monopolize or attempt to monopolize the production, control, or sale of any commodity, on the prosecution, management, or control of any kind, class, or description of business; or which shall destroy, or attempt to destroy, competition in the manufacture or sale of a commodity.”³

§ 205. **Arkansas.**—“Any corporation organized under the laws of this or any other State, or country, and transacting or conducting any kind of business in this State, or any partnership or individual, or other association or persons whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to any pool, trust, agreement, combination, confederation or understanding, whether the same is made in this State or elsewhere, with any other corporation, partnership, individual, or any other person or association of persons,

N. D. (§ 226); Utah (§ 233). Civil Code (1907), §§ 4594-6 relate to restrictions upon competition in insurance business. Pooling arrangements in railroad business are prohibited by § 5497; Crim. Code (1907), § 7687. By Const., § 103 “the legislature shall provide by law for the regulation, prohibition or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade or commerce or from increasing unreasonably the cost thereof

to the consumer, or preventing reasonable competition in any calling, trade or business.”

² Crim. Code (1907), § 7580. For similar provisions, see under Ill. (§ 209); Iowa (§ 211); Kan. (§ 212); Ky. (§ 213); Mich. (§ 217); Mo. (§ 220); Ohio (§ 227); Tex. (§ 232); Utah (§ 233). The punishment is the same as under § 7579, *supra*. These sections must be given as a special charge to the grand jury. § 7582.

³ Crim. Code (1907), § 7581. The punishment is the same as under § 7579.

to regulate or fix either in this State or elsewhere the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, . . . or who are now, or shall hereafter enter into, become a member of, or a party, to any pool, agreement, contract, combination, association or confederation, whether made in this State or elsewhere, to fix or limit in this State or elsewhere, the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, . . . shall be deemed and adjudged guilty of a conspiracy to defraud.”⁴

⁴ L. 1905, c. 1, § 1 (with provisions specially applicable to insurance against “fire, lightning, storm, cyclone, tornado”). For similar provisions, see under Ala. (§ 204); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Mo. (§ 220); N. D. (§ 226); S. C. (§ 229); Utah (§ 233). In *Hartford Fire Ins. Co. v. State*, 76 Ark. 303; 89 S. W. 42 (1905), this was held applicable to a foreign insurance corporation doing business in the State, while a member of a pool, etc., to fix rates, though such pool, etc., is not created or maintained in the State, and does not affect or fix, or attempt to affect or fix rates of insurance in the State. And such provision was held free from objection on constitutional grounds. As to distinction between “conspiracy to defraud” and criminal conspiracy at common law, see *Hammond Packing Co. v. State*, *infra*. By § 2 the penalty for a violation of any of the provisions of the act is a forfeiture of not less than \$200, or more than \$5,000 for each offense, and each day of continuance of violation shall be a separate offense; by § 3 provision is made for

a forfeiture of the rights and privileges of a corporation, foreign or domestic, violating such provisions. See *Hammond Packing Co. v. State*, 81 Ark. 519; 100 S. W. 407, 1199 (1907); affirmed in 212 U. S. 322; 29 Supm. 370 (1909). By § 4 “the sale, delivery, or disposition of any of the articles, commodities or things hereinbefore mentioned, by any individual, company or corporation transacting business contrary to the provisions of this act within this State, is hereby declared to be unlawful and contrary to public policy, and the purchaser of any article or commodity from any such offending individual, company or corporation shall not be liable for the price or payment thereof, whether the purchase was made directly from the individual, company or corporation so unlawfully transacting business, or indirectly from one who acted for such individual, company or corporation as agent, representative, solicitor or canvasser. And provided, further, that where any money or other thing of value is paid to such individual, company or corporation so unlawfully transact-

§ 206. **California.**—"A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes: (1) To create or carry out restrictions in trade or commerce. (2) To limit or reduce the production, or increase or reduce the price of merchandise or of any commodity. (3) To prevent compe-

ing business, its agent, representative, solicitor or canvasser, the person so paying the same may recover back the amount of the money or the value of the thing so paid." For similar provisions, see under Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Mo. (§ 220); N. M. (§ 223); N. D. (§ 226); see also under Kan. (§ 212). As to § 4 being confined to transaction of business within State, see *Frank A. Menne Factory v. Harback*, 85 Ark. 278; 107 S. W. 991 (1908). § 5 seems substantially identical with S. C. L. 1902, c. 574, § 2. See also under Ga. (§ 207); Miss. (§ 219). And § 6 is to like effect with S. C. L. 1902, c. 574, § 3. § 7 seems substantially to the same effect as the provisions added by L. 1893, p. 89, to Ill. L. 1891, p. 206 (see § 209). In *State v. International Harvester Co.*, 79 Ark. 517; 96 S. W. 119 (1906), distinguishing *People ex rel. Akin v. Butler Street Foundry Co.*, 201 Ill. 236; 66 N. E. 349 (1903), held not a violation of the act to continue to do business in the State after failure or refusal to file affidavit.

By §§ 8, 9, provision is made for taking testimony; by §§ 10, 11, as to the duty and compensation of prosecuting officers. In *Hammond Packing Co. v. State*, supra, §§ 8, 9 were sustained against constitutional objections, as applicable to books

of foreign corporation not kept within State.

In *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466; 51 S. W. 633; 45 L. R. A. 348 (1899), acts and agreements not affecting persons or property or the price of insurance within the State were held not within a former act. See also *State v. Ætna Fire Ins. Co.*, 66 Ark. 480; 51 S. W. 638 (1899). But the prohibition of the act of 1905 was, in *Hartford Fire Ins. Co. v. State*, 76 Ark. 303; 89 S. W. 42 (1905), held to apply to membership by a foreign corporation in a combination, though not created or maintained in the State, and not affecting or fixing, or attempting to affect or fix rates of insurance in the State. Such prohibition was held within the power of the State. By L. 1907, c. 184, an insurance corporation may do business in the State, if not a member, etc., of a pool, etc., to regulate, etc., insurance premiums on property in the State. As to prohibition against pooling, see § 12; *Digest* (1904), §§ 6726, 6805.

"Perpetuities and monopolies are contrary to the genius of a republic and shall not be allowed." Const., art. 2, § 19. For similar provisions, see under Md. (§ 216); N. C. (§ 225); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231); Tex. (§ 232); Wash. (§ 234); Wyom. (§ 236).

tition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. (4) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State. (5) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void.”⁵

⁵ L. 1907, c. 530, § 1. For similar provisions, see under Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Neb. (§ 222); N. D. (§ 226); Ohio (§ 227); S. C. (§ 229); Tex. (§ 232).

By § 2 provision is made for forfeiture of the rights, etc., of, and dissolution of a corporation violating the act, so by § 3 for forfeiture of the rights of a foreign corporation.

By § 4 the penalty prescribed is

a fine of not less than \$50 or more than \$5,000, and imprisonment for not less than six months or more than a year, or both.

As to sufficiency of indictment, etc., and of proof, and as to procuring of testimony, see §§ 5, 6.

By § 7 provision is made for a penalty of \$50 for each day of commission or continuance of violation of the act after notice provided for. See as to duty of prosecuting officer.

§ 206a. **Florida.**⁶

§ 207. **Georgia.**⁷

§ 208. **Idaho.**—"No incorporated company or any association of persons or stock company in the State of Idaho, shall

By § 8 "any contract or agreement in violation of the provisions of this act, shall be absolutely void and shall not be enforceable either in law or equity."

By § 9 the provisions of the act are cumulative.

By § 10 "it shall not be lawful for any person, partnership, association, or corporation or any agent thereof, to issue or to own trust certificates, or for any person, partnership, association or corporation, agent, officer or employee, or the directors or stockholders of any corporation" (etc., as in Ill. L. 1891, p. 206, § 2). Provision is also made for a fine of not less than \$50 or more than \$5,000.

By § 11 "any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act" may sue therefor and recover "twofold the damages by him sustained" with costs. For similar provisions, see under Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Mo. (§ 220); Neb. (§ 222); N. M. (§ 223); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231); Utah (§ 233); Wis. (§ 235). See § 12 as to application of word "person." L. 1893, c. 19, was limited to combinations relating to live stock. See, as to prohibition of pooling combination between carriers, Const., art. 12, § 20.

⁶ See L. 1897, § 4534, as to sale of meat; *Stewart v. Stearns & Cul-*

ver Lumber Co., 48 So. 19 (Supm. Ct. Fla., 1908).

⁷ Following *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; 22 Supm. 431; 46 L. Ed. 679 (1902) (see § 209), the anti-trust act of L. 1896, p. 68, was in *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 453; 41 S. E. 553, 563; 57 L. R. A. 547, 559; 90 Am. St. Rep. 126 (1902), held unconstitutional.

For prohibition against restriction upon competition in business of insurance, see Civil Code (1895), §§ 2085-8. "The general assembly of this State shall have no power to authorize any corporation to buy shares or stock in any other corporation in this State or elsewhere, or to make any contract or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void." Const., art. 4, § 2, para. 4. In *Trust Co. of Georgia v. State*, 109 Ga. 736; 35 S. E. 323; 48 L. R. A. 520 (1900), such provision was held to declare no new principle, but to be "simply the embodiment of the common law." See as to application to street railroad corporations. So in *State v. Central of Georgia Ry. Co.*, 109 Ga. 716, 727, 728; 35 S. E. 37, 40, 41; 48 L. R. A. 351, 352 (1900), to be "simply declaratory of the common law principle recognized in *Central R. R. Co. v. Collins*, 40 Ga. 582

directly or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders or in any manner whatsoever, for the purpose of fixing the price,

(1869), the purpose being to make that principle, so far as corporations were concerned, the organic law of the State, and thus put it beyond the power of the legislature to grant to corporations any rights or privileges inconsistent with its terms." *Central R. R. Co. v. Collins* (decided before the existence of such constitutional provision) was here said to have been "evidently based upon the common law doctrine that contracts or agreements producing monopoly or lessening or defeating competition, were void." It was also here said (109 Ga. 735; 35 S. E. 44; 48 L. R. A. 359), that if such provision "contains a new principle unknown to the common law, then the clause in question is evidently not self-acting, for no light is thrown upon the new meaning intended to be given the words used. It would follow, therefore, that appropriate legislation would be necessary to carry into effect such a new principle, whatever it might be." The test of application of the prohibition was declared to be (109 Ga. 723; 35 S. E. 39; 48 L. R. A. 354), "whether or not such a contract is injurious to the public interest," the court saying (109 Ga. 726; 35 S. E. 40; 48 L. R. A. 355): "At common law the test of validity of agreements relating to a restraint of trade, or, *what is the same thing, to lessening competition and encouraging monopoly*, is whether or not the public interests have been injuriously affected." Here a consolidation of

railroad corporations was held not in violation of the prohibition inasmuch as it did not injuriously affect the public interests. The court said (109 Ga. 733; 35 S. E. 43; 48 L. R. A. 358); "We must look at the results in their entirety, and the effect upon the general public interested in the traffic of the road along its line. If that general effect be to increase competition to a far greater extent than it has been diminished at particular points, it cannot with reason be said that competition has been defeated or lessened. In point of fact it has actually been increased." Moreover such prohibition was held not applicable to the purchase or ownership or control of branch roads, it being said (109 Ga. 735; 35 S. E. 43; 48 L. R. A. 358): "Doubtless in the purchase of connecting lines and branch roads competition was lessened at given points, but the general effect of these consolidations and connections has really been to increase competition, has added greatly to the public convenience, furnished greater and more commodious facilities for traveling, has portation, has brought remote parts of the country in close proximity, as it were, to each other, has developed resources that would otherwise have remained dormant, by opening up the markets of the world to the products of the land, and has generally contributed to work to the welfare and prosperity of the people." See also, as to the effect of such provision, *Kates v. Atlanta*

or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people; and the legislature (is) required to pass laws for the enforcement thereof, by adequate penalties, to the extent, if necessary for that purpose, of the forfeiture of their property and franchise.”⁸

§ 209. **Illinois.**—“If any corporation organized under the laws of this or any other State or country, for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment, as provided in this act.”⁹ “It shall not be lawful for any corporation

Baggage & Cab Co., 107 Ga. 636, 644; 34 S. E. 372, 375; 46 L. R. A. 431, 435 (1899); *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429, 448; 41 S. E. 553, 561; 57 L. R. A. 547, 557; 90 Am. St. Rep. 126 (1902); *Langdon v. Branch*, 37 Fed. 449, 462; 2 L. R. A. 120, 128 (C. C. Ga., 1888); *Hamilton v. Savannah, F. & W. Ry. Co.*, 49 Fed. 412 (C. C. Ga., 1892); *Clarke v. Central R. R. & Banking Co.*, 50 Fed. 338; 15 L. R. A. 683 (C. C. Ga., 1892); *Clarke v. Richmond & W. P. Terminal, etc., Co.*, 62 Fed. 328; 10 C. C. A. 387 (5th C., 1894); *Dady v. Georgia & A. Ry.*, 112 Fed.

838 (C. C. Ga., 1900). Compare under Ark. (§ 205); Miss. (§ 219); N. Y. (§ 224); Okla. (§ 228); S. C. (§ 229); Tex. (§ 232); Wis. (§ 235); Wyom. (§ 236).

⁸ Const., art. 11, § 18. For similar provisions, see under Mont. (§ 221); S. D. (§ 230); Wash. (§ 234).

⁹ L. 1891, p. 206, § 1; R. S. (Starr & Curtis' Ed., 1896), c. 38, § 99. For similar provisions, see under Ala. (§ 204); Ark. (§ 205); Iowa (§ 211); Ky. (§ 213); Minn. (§ 218); Miss. (§ 219); Mo. (§ 220); N. D. (§ 226); S. C. (§ 229); Utah (§ 233). The act of 1891 was not

to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any

repealed by that of 1893, *infra*. *People ex rel. Akin v. Butler Street Foundry Co.*, *infra* (201 Ill. 257; 66 N. E. 356). In *Chicago, Wilmington, etc., Coal Co. v. People*, 214 Ill. 421, 445; 73 N. E. 770, 777 (1905), the act of 1891 was held not to repeal *R. S. (Starr & Curtis' Ed., 1896)*, c. 38, § 96, making punishable criminally a conspiracy "to do any illegal act injurious to the public trade." See as to sufficiency of indictment thereunder. To the same effect, *Sanford v. People*, 121 Ill. App. 619 (1905). In *People v. Aachen & Munich Fire Ins. Co.*, 126 Ill. App. 636 (1906), the anti-trust legislation of the State was held not to abrogate "the common law rule with respect to combinations and conspiracies in restraint of trade." But in *Southern Fire Brick Co. v. Sand Co.*, 223 Ill. 616; 79 N. E. 313; 9 L. R. A. N. S. 446 (1906); affirming *Garden City Sand Co. v. Southern Fire Brick & Clay Co.*, 124 Ill. App. 599 (1906), the act of 1891 was held inapplicable to a reasonable contract in restraint of trade.

See generally, as to application of act, *Heimbuecher v. Goff*, 119 Ill. App. 373 (1905).

By L. 1897, p. 298, was added an amendment exempting certain arrangements to maintain or increase wages, but this was held unconstitutional in *People ex rel. Akin v. Butler Street Foundry Co.*, 201 Ill. 236, 259; 66 N. E. 349, 356 (1903), without, however, affecting the validity of the act sought to be

amended. See also *Lafayette Bridge Co. v. City of Streator*, 105 Fed. 729 (C. C. Ill., 1900); *Chicago, Wilmington, etc., Coal Co. v. People*, 214 Ill. 421, 454; 73 N. E. 770, 780 (1905). For similar exemptions, see under La. (§ 214); Mich. (§ 217); Mont. (§ 221); Neb. (§ 222); N. C. (§ 225); Wis. (§ 235). The act of 1891 has no extraterritorial effect. *People ex rel. Akin v. Butler Street Foundry Co.*, *supra* (159 Ill. 249; 66 N. E. 353); *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491; 78 C. C. A. 607 (7th C., 1906). The prohibition of § 1 was held applicable to a corporation having fifteen hundred members, and thus described: "Appellee receives milk from members, and accounts to them for the same; guarantees to members payment for milk sold by it; fixes and determines the price of milk; retains five cents upon each can of milk sold, for each year; has authority over all milk consigned by any of its members to any stand within the corporate limits of the city of Chicago; a member cannot sell his stock except to a shipper and producer of milk, and must own as many shares as he ships cans of milk per day, but not to own more than fifty shares of stock." *Ford v. Chicago Milk Shippers' Assoc.*, 155 Ill. 166; 39 N. E. 651; 27 L. R. A. 298 (1895). The court said: "The corporation as an entity may not be able to create a trust or combination with itself, but its individual shareholders may, in con-

stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article.”¹⁰

trolling it, together with it, create such trust or combination that will constitute it, with them, alike guilty.” See also *Harding v. American Glucose Co.*, *infra*. Such prohibition was in *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502 (1896), applied to an extensive combination of manufacturers of strawboard and paper.

To similar effect with *Welch v. Phelps & Bigelow Windmill Co.* (see under *Tex.*, § 232), as to a mere arrangement between principal and agent, see *Weiboldt v. Standard Fashion Co.*, 80 Ill. App. 67 (1899). As to application of act to corporation organized to acquire patents, etc., see § 148.

In an indictment against corporations under the act, held unnecessary to allege the place of their organization, or whether they were authorized to transact or conduct business in the State. *Chicago, Wilmington, etc., Coal Co. v. People*, 214 Ill. 421, 446; 73 N. E. 770, 777 (1905).

¹⁰ L. 1891, p. 206, § 2; R. S. (Starr & Curtis' Ed., 1896), c. 38, § 100. For similar provisions, see under *Ala.* (§ 204); *Iowa* (§ 211); *Kan.* (§ 212); *Ky.* (§ 213); *Mich.* (§ 217); *Mo.* (§ 220); *Ohio* (§ 227); *Utah* (§ 233). See also under *Me.* (§ 215).

The act of L. 1893, p. 182; R. S.

(Starr & Curtis Ed., 1896), c. 38, §§ 109 et seq., was in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; 22 Supm. 431; 46 L. Ed. 679 (1902), as an entirety, held unconstitutional as repugnant to the 14th amendment, by reason of the provision of § 9, that the act should “not apply to agricultural products or live stock while in the hands of producer or raiser. See *Dunbar v. American Telephone, etc., Co.*, 87 N. E. 521, 528 (Supm. Ct. Ill., 1909). See also under *Ga.* (§ 207); *Ind.* (§ 210); *La.* (§ 214); *Mich.* (§ 217); *Mont.* (§ 221); *N. C.* (§ 225); *N. D.* (§ 226); *Tenn.* (§ 231); *Tex.* (§ 232). Compare under *Mont.* (§ 221).

In *Harding v. American Glucose Co.*, 182 Ill. 551, 616, 625; 55 N. E. 577, 599, 602; 64 L. R. A. 738, 764, 767; 74 Am. St. Rep. 189 (1899), the prohibition of § 1 of the act of 1893, against a combination of capital or acts to create or carry out restrictions in trade and to prevent competition, had been applied to a combination among “six corporations engaged in the manufacture of glucose, which can only be manufactured in a certain district or extent of country, and which, with the exception of one small plant, were the only corporations engaged in such business.” It also appeared that “the ability to

§ 210. **Indiana.**—"Every scheme, design, understanding, contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce, or to deny or re-

prosecute such business was rare" and that it was "difficult for new parties, not familiar with it, to engage in it."

The act of 1891 was, in *Ford v. Chicago Milk Shippers' Assoc.*, supra, held to apply to a corporation formed before its passage. As to application of acts of 1891 and 1893 to foreign corporation, see *Harding v. American Glucose Co.*, supra (182 Ill. 635; 55 N. E. 605; 64 L. R. A. 771). In *Dunbar v. American Telephone, etc., Co.*, supra, it was held unnecessary to determine whether there was a violation of the act in case of purchase of stock of a corporation.

By way of penalty for a violation of the act of 1891 by "a corporation or a company, firm or association," a fine of not less than \$500 or more than \$2,000 is prescribed by § 3 for the first offense; so of not less than \$2,000 or more than \$5,000 for the second; not less than \$5,000 or more than \$10,000 for the third; of \$15,000 for every subsequent offense, "provided that in all cases under this act either party shall have the right of trial by jury." By way of penalty for a violation of the act by an "officer or agent or receiver of any corporation, company, firm or association, or any member of any company, firm or association, or any individual," a fine of not less than \$200 or more than \$1,000 or imprisonment for not more than a year, or both, in the discretion of the court, is prescribed by § 4. "Any contract or agree-

ment in violation of any provision of the preceding sections of this act shall be absolutely void." § 5. In *American Strawboard Co. v. Peoria Strawboard Co.*, 65 Ill. App. 502 (1896), was held not maintainable an action on a guaranty of rent due under a lease of a mill to a corporation, the whole object and design of the organization of which was to limit the production and enhance the price of the commodity in question. It appeared that such lease was a mere shift or device to evade the act; that it was not made in good faith, but was part of a device whereby, for the purpose of transferring possession under the form of a lease, the lessor was to receive under the name of a rent a bonus for permitting its plant to remain idle and to cease production. In *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491; 78 C. C. A. 607 (7th C., 1906), in an action for the price of goods sold, it was held no defense under § 5 that the seller was the exclusive sales agent of an illegal combination, it being said: "The contract thereby denounced (by § 5) as void is plainly one which directly contravenes the earlier sections; one in which the trust takes root, or by which the illicit scheme is organized. The defendant purchased the paper in the ordinary course of business. It was a stranger to the alleged unlawful combination. The sale of the merchandise had no direct relation to the prohibitions of §§ 1 and 2." Here were cited as

fuse to any person or persons full participation, on equal terms with others, in any telegraphic service transmitting matter prepared or intended for public use, or to limit or reduce the production, or increase or reduce the price of merchandise or any

drawing the same distinction under the Federal act, *Hopkins v. U. S.*, 171 U. S. 578, 592; 19 Supm. 40, 45; 43 L. Ed. 290 (1898); *Anderson v. U. S.*, 171 U. S. 604, 615; 19 Supm. 50, 54; 43 L. Ed. 300 (1898). "Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment." § 6. For similar provisions, see under Ark. (§ 205); Iowa (§ 211); Ky. (§ 213); Mo. (§ 220); N. M. (§ 223); N. D. (§ 226). See also under Kan. (§ 212). This provision was applied in *Ford v. Chicago Milk Shippers' Assoc.*, *supra*, holding not maintainable an action by a corporation composed of milk producers, to recover for milk sold. See, however, *Wiley v. National Wall Paper Co.*, 70 Ill. App. 543 (1896). But in *Lafayette Bridge Co. v. City of Streator*, 105 Fed. 729 (C. C. Ill., 1900), such provision was held unavailable to a purchaser in the absence of adjudication by a competent tribunal, in a direct proceeding instituted for that purpose, determining that such seller is a trust or combination in the sense contemplated by the act, *Ford v. Chicago Milk Shippers' Assoc.*, being distinguished on the ground that the point was not there raised. In *Chicago Wall Paper*

Mills v. General Paper Co., 147 Fed. 491; 78 C. C. A. 607 (7th C., 1906), the provision was held unavailable where the acts constituting the illegal restriction were performed outside the State. See also as to application of § 6, *Peoria Gas & Electric Co. v. Peoria*, 200 U. S. 48; 26 Supm. 414; 50 L. Ed. 365 (1906). In *Connolly v. Union Sewer Pipe Co.*, *supra*, such a defense under the act of 1893 was held unavailable by reason of the unconstitutionality of the statute. By § 7 provision is made for the recovery of fines in an action of debt in the name of the people. In *Chicago, Wilmington, etc., Coal Co. v. People*, 214 Ill. 421, 447; 73 N. E. 770, 777 (1905), this was held not to preclude an indictment as a remedy against a corporation. By provisions added by L. 1893, p. 89; R. S. (Starr & Curtis' Ed., 1896), c. 38, § 107, any corporation doing business in the State is required to make oath in a prescribed form in answer to an inquiry from the secretary of State as to whether it "has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of this act." For failure to comply the corporation becomes liable to a penalty of \$50 a day after refusal or failure to make such oath, or to forfeiture of charter (in case of a foreign corporation, revocation of the right to do business). But no liability to any criminal

commodity, natural or artificial, or to prevent competition in manufacturing, within or without this State, is hereby declared to be illegal.”¹¹ “Every person who shall monopolize or at-

prosecution is to result “by reason of anything truthfully disclosed by the affidavit required by this act, or truthfully disclosed in any testimony elicited in the execution thereof.” For similar provisions, see under Mo. (§ 220); Wis. (§ 235). In *People ex rel. Akin v. Butler Street Foundry Co.*, 201 Ill. 236; 66 N. E. 349 (1903), the provisions added in 1893 were held constitutional as affording complete immunity to those required thereby to furnish evidence. Notwithstanding the general language of the requirement, the affiant is only required to take into consideration acts of the corporation while engaged in business wholly within the State, and if in connection with that business it has not been connected with any trust, etc., within the State, or otherwise violated the anti-trust legislation of Illinois, he may truthfully make the affidavit to that effect, though the corporation at the same time in its business outside the State has been connected with trusts, etc., in violation of the Federal act. *Id.* Nor are the provisions added in 1893 unconstitutional as an attempt on the part of the legislature to exercise judicial power, or as singling out corporations as the only class upon which the act is to operate, and exempting individuals and partnerships, or because of the exemption of corporations organized under the building loan and homestead association laws. *Id.* Such provisions do not apply to corporations organized under such laws. See as

amended by L. 1907, p. 216. By § 8 provision is made as to the duty and compensation of prosecuting officers and as to the disposition of fines.

¹¹ Stat. (Burns' Ed., 1908), § 3866. There is here a saving of “powers, rights or privileges now existing or conferred by law.” And “it shall be a good defense to any action growing out of any violation of the provisions of this act or any other act or common law relating to the subject-matter of this act, if the defendant shall plead, and by a fair preponderance of the evidence, prove that such violation is not in restraint of trade or commerce, or does not restrict trade or commerce, or limit or reduce the production, or increase or reduce the price of merchandise, or any commodity, natural or artificial, or prevent competition in manufacturing.”

The penalty for a violation of § 3866 or § 3867 is a fine not exceeding \$5,000, to which may be added imprisonment not exceeding a year. §§ 3868, 3869 relate to restrictions upon “bidding for the letting of any contract for private or public work.” As to proceedings for violation of the act, see §§ 3870, 3873, 3874, as to obtaining evidence, §§ 3871, 3876. By § 3872 for injury to business or property by reason of doing anything forbidden or declared to be unlawful by the act, there may be recovered a penalty of threefold the damages with costs. For similar provisions, see under Cal. (§ 206); Kan. (§

tempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or com-

212); Mich. (§ 217); Minn. (§ 218); Miss. (§ 219); Mo. (§ 220); Neb. (§ 222); N. M. (§ 223); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Utah (§ 233); Wis. (§ 235). As to application of word "person," see § 3875. By § 3877 the provisions of the act are cumulative.

The former act (§§ 3878, et seq.) is probably unconstitutional because of the provision of § 3881 that the act "shall not apply to agricultural products or live stock while in the possession of the producer or raiser." See § 181, *supra*; also under Ill. (§ 209); La. (§ 214); Mich. (§ 217); Mont. (§ 221); N. C. (§ 225); N. D. (§ 226); Tenn. (§ 231); Tex. (§ 232). In *Sterling Remedy Co. v. Wyckoff*, 154 Ind. 437; 56 N. E. 911 (1900), the act was held not to apply to a contract entered into prior to its enactment. The act was applied in *Over v. Byram Foundry Co.*, 37 Ind. App. 452; 77 N. E. 302; 117 Am. St. Rep. 327 (1906).

By § 3889 "all arrangements, agreements, trusts or combinations, or any agreement or arrangements that are made whereby a party or corporation refuses to furnish any article or articles required to be used in the manufacture of any article or merchandise when the party or corporation can furnish the same, or by charging more than the regular and ordinary price for the same or doing or refusing to do any act or acts that would cause such party to cease to manufacture such article or hinder such person or corporation from so doing, and all arrangements, contracts or acts

done or performed between any person or corporation made for the purpose of compelling any person or corporation engaged in the business of manufacturing any article of merchandise to cease manufacturing any such article, or compelling the same to close down or go out of business, is hereby declared to be against public policy, unlawful and void." Compare as to prohibitions against boycotts, under S. C. (§ 229); Tex. (§ 232). See also under Ohio (§ 227). By § 3890 provision is made for forfeiture of the charter of a domestic corporation for violation of any of the provisions of the act, and for denial to a foreign corporation of the right to do business for such violation. As to whether commencement of action is doing business, see *Sterling Remedy Co. v. Wyckoff*, *supra*. By § 3891 any violation of the provisions of the act "shall be deemed and is hereby declared to be destructive of full and free competition and a conspiracy against trade." The penalty is a fine of not less than \$100 or more than \$5,000, and imprisonment not less than one or more than ten years, or both such fine and imprisonment. By § 3892 any person damaged by a combination, etc., such as described in § 3889, may recover the full consideration or sum paid for any goods, etc., the sale of which is controlled by such combination. See under Kan. (§ 212); N. D. (§ 226); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231).

For prohibition of restriction in express business, see §§ 3915-7.

merce within this State. shall be deemed guilty of a misdemeanor." ¹²

§ 211. **Iowa.**—"Any corporation organized under the laws of this or any other State or country for transacting or conducting any kind of business in this State, or any partnership, association or individual creating, entering into or becoming a member of or a party to any pool, trust, agreement, contract, combination, confederation or understanding with any other corporation, partnership, association or individual, to regulate or fix the price of any article of merchandise or commodity, ¹³ or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, shall be guilty of a conspiracy." ¹⁴

§ 212. **Kansas.**—"A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either,

¹² § 3867.

¹³ In *Rohlf v. Kasemeier*, 118 N. W. 276 (Supm. Ct. Iowa, 1908), held not to apply to a combination to fix the price of labor, in this case, of medical services.

¹⁴ Code (1897), § 5060. See *Willson v. Morse*, 117 Iowa, 581; 91 N. W. 823 (1902). For similar provisions, see under Ala. (§ 204); Ark. (§ 205); Ill. (§ 209); Ky. (§ 213); Minn. (§ 218); Miss. (§ 219); Mo. (§ 220); N. D. (§ 226); Okla. (§ 228); S. C. (§ 229); Utah (§ 233). §§ 5061, 5063, 5064 are to substantially the same effect as Ill. L. 1891, p. 206, §§ 2, 5, 6 respectively (§ 209). By § 5062 (as amended by L. 1907, c. 187), by way of penalty for a violation of § 5060 or § 5061, a corporation, company, firm or association shall be fined not less than \$500 or more than \$5,000; an officer or member thereof or an individual shall be so fined, or be imprisoned not more

than a year, or both; by §§ 5065, 5066, provision is made for the forfeiture of the charter of a domestic corporation violating any of the preceding provisions; see § 5067 as to duties and compensation of prosecuting officers. As to constitutionality of §§ 5060, 5061, 5062, see *Dorn v. Cooper*, 117 N. W. 1 (Supm. Ct. Iowa, 1908).

In *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401; 26 Supm. 66; 50 L. Ed. 246 (1905); reversing *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121 (C. C. Iowa, 1903), was sustained § 1754 relating only to combinations affecting fire insurance. See *Beechley v. Mulville*, 102 Iowa, 602; 70 N. W. 107; 63 Am. St. Rep. 479 (1897), as to application of § 5060 to combination to fix rates of insurance. By § 2127 pooling contracts among carriers are prohibited.

L. 1907, c. 187, relates to "grain combinations."

any or all of the following purposes: (1) To create or carry out restrictions in trade ¹⁵ or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State. (2) To increase or reduce the price of merchandise, produce or commodities or to control the cost or rates of insurance. (3) To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce. (4) To fix any standard or figure whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State. (5) To make or enter into, or execute or carry out, any contract, obligation or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale or manufacture of any such article or commodity; or by which they shall agree to pool, combine or unite any interest they may have in connection with the manufacture, sale or transportation of any such article or commodity, that its price may in any manner be affected.” ¹⁶

¹⁵ The word “trade,” as used in the title of the act of 1889, was held to include the business of insurance. *Matter of Pinkney*, 47 Kan. 89; 27 Pac. 179 (1891); *State v. Phipps*, 50 Kan. 609; 31 Pac. 1097; 18 L. R. A. 657; 34 Am. St. Rep. 152 (1893); so to mean *domestic*, as distinguished

from interstate, trade. *State v. Phipps*, supra.

¹⁶ G. S. (Dassler's Ed., 1905), § 4464 (L. 1897, c. 265). Such combinations are declared “to be against public policy, unlawful and void.” *Id.* For similar provisions, see under Cal. (§ 206); La. (§ 214); Mich. (§ 217); Miss. (§ 219); Neb.

§ 213. **Kentucky.**—"If any corporation under the laws of Kentucky, or under the laws of any other State or country, for transacting or conducting any kind of business in this State, or any partnership, company, firm or individual, or other asso-

(§ 222); Ohio (§ 227); S. D. (§ 230); Tex. (§ 232); Wis. (§ 235). In *Smiley v. Kansas*, 196 U. S. 447; 25 Supm. 276; 49 L. Ed. 546 (1905); affirming *State v. Smiley*, 65 Kan. 240; 69 Pac. 199; 67 L. R. A. 903 (1902), the act of 1897 was sustained as not in conflict with the 14th amendment, so far as applicable to a secret arrangement by which under penalties an apparently existing competition among all the dealers in a necessary of life (wheat) in a small village, was substantially destroyed without any merging of interests through partnerships or incorporation. The court said: "That is as far as we need to go in sustaining the judgment in this case. That is as far as the Supreme Court of the State went. If other transactions are presented in which there is an absolute freedom of contract beyond the power of the legislature to restrain, which come within the letter of any of the clauses of this statute, the courts will undoubtedly exclude them from its operation." To the same effect, *State v. Wilson*, 73 Kan. 343; 84 Pac. 737; 117 Am. St. Rep. 479 (1906); see also *State v. Jack*, 69 Kan. 387; 76 Pac. 911; 1 L. R. A. N. S. 167 (1904); *Re Bell*, 69 Kan. 855; 76 Pac. 1129 (1904). See under Tex. (§ 232), *National Cotton Oil Co. v. Texas*, 197 U. S. 115; 25 Supm. 379; 49 L. Ed. 689 (1905).

In *State v. Wilson*, 73 Kan. 334; 80 Pac. 639 (1905), the act of 1897 was, as a penal statute, held

to require "a strict, rather than a free, construction." See, however, subsequent decision in 73 Kan. 343; 84 Pac. 737; 117 Am. St. Rep. 479 (1906), where it was held applicable to an agreement among those engaged in buying and selling live stock for others, as to amount of compensation.

In *State v. International Harvester Co. of America*, 99 Pac. 603 (Supm. Ct. Kan., 1909), the act was applied in holding illegal a combination of corporations for the manufacture of harvesting machinery, effected through the medium of a holding corporation, it being said (99 Pac. 607): "None of these transfers (to the holding company) were actual sales made in good faith, but were mere shifts by which to create a consolidation, under one management, of these immense aggregations of capital. . . . The purchase of these corporations was accomplished by issuing to them in payment therefor, the stock of the (holding company), which was selected by the association, to hold and manage the business of all. This corporation, under the contract of the association, buys the entire output of machinery produced by the subordinate companies, and places the same upon the market through its agents at prices fixed by it; each agent being confined exclusively to the sale of machinery obtained from this company. . . . By the contract under which this combination is made, the defendant receives all commod-

ciation of persons shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or under-

ities sold by it from the holding company, and is prohibited from dealing in any other, while the subordinate corporations dispose of all their productions to the holding company and are prohibited from selling their products to any other buyer."

"All persons, companies or corporations within this State are hereby denied the right to form or to be in any manner interested either directly or indirectly, as principal, agent, representative, consignee or otherwise, in any trust as defined in § 1." § 4465 (2). By §§ 4466, 4467 (3, 4) provision is made for the forfeiture of the charter of a corporation and its dissolution, for a violation of the provisions of the act; also for subjecting its stockholders, officers, etc., to the penalties of the act. By § 4468 (5), a person or corporation violating any of the provisions of the act within the State is prohibited from doing business in the State, and it is prohibited to handle the goods of or deal with such person or corporation. Of this provision it was said in *State v. Jack*, 69 Kan. 387; 76 Pac. 911; 1 L. R. A. N. S. 167 (1904), that this contemplates "prohibiting of the continuance of or engagement in business in the State only when such business is in violation of the act"; that "it was not intended thereby to prohibit persons from continuing or engaging in any lawful business in the State, not conducted or carried on in violation of the act." Provision is also made for en-

forcing the provisions of this section by injunction or other proceeding; the penalty for violation is a fine of not less than \$100 or more than \$1,000 and imprisonment for not less than 30 days or more than six months, also a forfeiture of not less than \$100 for each day of violation. By § 4469 (6), by way of penalty for a violation of the act is prescribed a fine of not less than \$100 or more than \$1,000, and imprisonment for not less than 30 days or more than 6 months, also a forfeiture of \$100 for each day of violation. Provision is also made for enforcing the act. "Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this State; and when any civil action shall be commenced in any court of this State it shall be lawful to plead in the defense thereof that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action, been guilty, either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act." § 4470 (7). See also under Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Mo. (§ 220); N. M. (§ 223); N. D. (§ 226). See *Barton v. Mulvane*, *infra*. That § 4470 "contemplates only civil actions re-

standing with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufac-

lating to and growing out of transactions prohibited by the act," see *State v. Jack*, 69 Kan. 387, 399; 76 Pac. 911, 915; 1 L. R. A. N. S. 167, 174 (1904), where it was said: "It was not intended by the legislature to deprive the litigant of the right to resort to the courts for the protection of property rights and interests not connected with such combinations or trusts. Thus interpreted the provision is a valid exercise of legislative power and is not open to the charge that it constitutes outlawry." To the same effect, *State v. Wilson*, 73 Kan. 334; 80 Pac. 639 (1905). In a subsequent decision in 73 Kan. 343; 84 Pac. 737; 117 Am. St. Rep. 479 (1906), such provision was applied to a mortgage, the consideration for which was a charge for commissions held illegal under the act. By § 4471 (8) a right of action is given to one damaged by any agreement, etc., described in §§ 4464 or 4465. For similar provisions, see under Cal. (§ 206); Mich. (§ 217); Miss. (§ 219); Mo. (§ 220); Neb. (§ 222); N. M. (§ 223); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Utah (§ 233); Wis. (§ 235). See under § 169, *Crystal Ice Co. v. Wylie*, 65 Kan. 104; 68 Pac. 1086 (1902). By § 4472 (9) provision is made for enforcement of the act; by § 4473 (10) for compelling the attendance and testimony of witnesses and for the prosecution of such violators of the act as the testimony of such witnesses shall disclose. In *State v. Jack*, 69 Kan. 387; 76 Pac. 911; 1 L. R. A.

N. S. 167 (1904), this provision was sustained against the objection of unconstitutionality, thus that the procedure thereunder is not judicial in its character and is not due process of law, and because of tendency to incriminate the witness. The immunity provided was held sufficient. It was held no objection that the answers of the witness might disclose violations of the Federal anti-trust act and the evidence thus given be used against him in a prosecution for violation of such act. To the same effect, *Re Bell*, 69 Kan. 855; 76 Pac. 1129 (1904).

The act of 1897 seems to supersede §§ 4443-51 (L. 1889, c. 257). See *State v. Wilson*, 73 Kan. 334; 80 Pac. 639 (1905). § 4443 (1) is similar to Tenn. L. 1903, c. 140, § 1 (see § 231); § 4444 to Ill. L. 1891, p. 206, § 2 (see § 209). For penalties, see § 4445 (3). By § 4446 (4) one damaged by any arrangement described in § 4443 (1) or § 4444 (2) may recover "the full consideration or sum paid by him for any goods, wares, merchandise and articles included in or advanced or controlled in price by said combination, or the full amount of money so borrowed." See also under Ind. (§ 210); S. D. (§ 230); Tenn. (§ 231). § 4447 (5) is similar to § 4470 (7), *supra*; § 4447 was held in *Barⁿ v. Mulvane*, 59 Kan. 313; 52 Pac. 883 (1898), notwithstanding the generality of the language, not to apply, where it did not appear that the contract and transactions upon which the action was based, formed any part of

tured articles or property ¹⁷ of any kind, or shall enter into, become a member of, or party to, or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting the amount or quantity of any article of property, commodity or merchandise to be produced or manufactured,

the illegal combination, or promoted it in effect or design; and, furthermore, the plaintiff was merely a small stockholder in a corporation that was a party to the combination. By § 4448 (6) "the purchase, sale or manufacture of any goods, wares, merchandise or other commodities in this State by any person or corporation who has entered into any such arrangements, contracts, agreements, trusts or combinations in any other State or Territory, as described in §§ 1 or 2 (4443 or 4444), or the purchase, sale or manufacture of any such articles by any agent or attorney for such person, or as an agent, officer or stock broker (holder?) of any such corporation as a trustee, committee or in any capacity whatever, shall constitute a violation of this act." In *State v. International Harvester Co.*, supra, this was applied to a sale by a corporation belonging to the corporation there held illegal.

By §§ 4449-51 (7-9) provision is made for enforcement of the above provision.

§§ 4452-4 (L. 1891, c. 158), relating to live stock were in *State v. Wilson*, 73 Kan. 343; 84 Pac. 737; 117 Am. St. Rep. 479 (1906), held repealed by the act of 1897, supra. See previous decision in 73 Kan. 334; 80 Pac. 639 (1905). The act of 1891 had been applied in

Greer v. Payne, 4 Kan. App. 153; 46 Pac. 190 (1896).

§§ 4455-9 (L. 1899, c. 293), relate to the business of dealing in grain, seeds, live stock or hay; see also as to pooling among grain dealers, §§ 4440-2; *State v. Smiley*, supra; *State v. Dreany*, 65 Kan. 292; 69 Pac. 182 (1902). For prohibition against agreement between railroad corporations for division of earnings, see § 6492.

¹⁷ The word "property" as here used was declared not to "include the right to enter into a contract of insurance, nor to fix the terms upon which such a contract will be made." *Ætna Ins. Co. v. Commonwealth*, 106 Ky. 864, 876; 51 S. W. 624, 626; 45 L. R. A. 355, 358 (1899). The prohibition against any agreement, etc., to "regulate or control or fix the price of any merchandise, manufactured articles or property of any kind" was held to apply to an agreement to raise the price of beer \$1 a barrel, though occasioned by the imposition of a tax of \$1 a barrel upon beer, the objection being overruled that the agreement relating to beer "was not illegal, for the reason that the cheaper the drink the more of it will be used, and the law does not favor the increased use of intoxicants. But the statute makes no such exception." *Commonwealth v. Bavarian Brewing Co.*, 112 Ky. 925; 66 S. W. 1016 (1902).

mined, bought or sold, shall be deemed guilty of the crime of conspiracy.”¹⁸ “It shall not be lawful for any corporation to issue, or to own, have or sell any trust certificates or stocks, or for any corporation’s agent, officer or employee, agent or director, or any corporation to enter into, either verbally or in writing, any combinations, contract, agreement or understanding with any person or persons, corporation or corporations, or with any director, agent or officer thereof, the purpose or effect of which combination, contract, agreement or understanding would

¹⁸ Stat. (1903), § 3915. For similar provisions, see under Ala. (§ 204); Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Minn. (§ 218); Miss. (§ 219); Mo. (§ 220); N. D. (§ 226); S. C. (§ 229); Utah (§ 233). “It shall be the duty of the General Assembly, from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations from combining to depreciate below its real value, any article, or to enhance the cost of any article above its real value.” Const., art. 198. As to effect thereof, see *Commonwealth v. International Harvester Co.*, *infra*. In *Commonwealth v. Bavarian Brewing Co.*, *supra*, § 3915 was held not in conflict with art. 198. In *Commonwealth v. Grinstead*, 108 Ky. 59; 55 S. W. 720 (1900), the provisions of § 3915 et seq. (enacted in 1890), were held not repealed by art. 198 (adopted in 1891), or by § 1 of the schedule of the Constitution; also held not repealed because of omission from act of 1893 revising criminal laws; also held not objectionable on the ground of uncertainty. To like effect, see *Commonwealth v. International Harvester Co.*, 115 S. W. 703 (Ct. App. Ky., 1909). In a subsequent deci-

sion in *Commonwealth v. Grinstead*, in 111 Ky. 203; 63 S. W. 427; 56 L. R. A. 709 (1901), § 3915 was held not violated by agreements by those purchasing from manufacturers not to sell for less than a fixed price. In *International Harvester Co. v. Commonwealth*, 99 S. W. 637 (Ct. App. Ky., 1907), it was applied in sustaining the conviction of a corporation for entering into a combination to fix the price of manufactured articles; i. e., harvesting machines. The agreement in question, though entered into outside, was executed within the State. In *Brewster v. Miller*, 101 Ky. 368; 41 S. W. 301; 38 L. R. A. 505 (1897), where no action was held to lie against the members of a combination for refusal to sell (see §§ 21, 164), it was regarded as unnecessary to determine whether such combination was within the prohibition of § 3915. See also as to application of § 3915, *Owen County Burley Tobacco Soc. v. Brumback*, *infra*. In *Commonwealth v. International Harvester Co.*, *supra*, it was sustained against the objection that the act of 1906, *infra*, produced a discrimination in favor of farmers. See also *American Tobacco Co. v. Commonwealth*, 115 S. W. 754 (Ct. App. Ky., 1909).

be to place the management, control or any part of the business of such combination or association, or the manufactured product thereof, in the hands or under the control, in whole or in part, of any trustee or trustees, or agents, or any person whatever, with the intent, or to have the effect to limit, fix, establish or change the price of the production or sale of any article of property or of commerce, or to prevent, restrict or in any way diminish the manufacture or output of any such article or property." ¹⁹

§ 214. Louisiana.²⁰

¹⁹ § 3916. For similar provisions, see under Ala. (§ 204); Ill. (§ 209); Iowa (§ 211); Mich. (§ 217); Mo. (§ 220); Ohio (§ 227); Utah (§ 233). See also under Me. (§ 215).

By way of penalty for a violation of the act, a fine of not less than \$500 or more than \$5,000 is prescribed and in certain cases imprisonment for not less than 6 or more than 12 months, or both such fine and imprisonment. § 3917. An indictment following the language of the statute was held sufficient in *Commonwealth v. Grinstead*, supra. § 3918 is to substantially the same effect as §§ 5, 6 of the Ill. act of 1891 (see § 209). By § 3919 provision is made for the forfeiture of the charter of a domestic corporation violating the act. For prohibition of pooling contracts between carriers, see Const., art. 201; against restriction upon competition in fire insurance business, L. 1902, c. 183; L. 1900, c. 110.

L. 1906, c. 117, amended by L. 1908, c. 8, relates to combining or pooling crops of wheat, tobacco and other products. See as to such act, *Owen County Burley Tobacco Soc. v. Brumback*, 107 S. W. 710 (Ct. App. Ky., 1908), where it was held

in violation of neither the constitutional prohibition of "grant of exclusive separate public emoluments or privileges" nor of 14th amendment, nor of Ky. Const., art. 198. To like effect, *Commonwealth v. International Harvester Co.*, 115 S. W. 703 (Ct. App. Ky., 1909). See also, as to such act, *International Harvester Co. v. Commonwealth*, 99 S. W. 637 (Ct. App. Ky., 1907).

²⁰ L. 1892, c. 90; R. S. (Wolff's Ed., 1904), p. 1804, is probably unconstitutional because of the provision of § 8 excepting from the operation of the act agricultural products or live stock while in the hands of the producer or raiser; also combinations or confederations of laborers for the purpose of increase of their wages or redress of grievances. See § 181; also under Ga. (§ 207); Ill. (§ 209); Ind. (§ 210); Mich. (§ 217); Mont. (§ 221); Neb. (§ 222); N. C. (§ 225); N. D. (§ 226); Tenn. (§ 231); Tex. (§ 232); Wis. (§ 235). For prior anti-trust act, see L. 1890, c. 86; R. S. (Wolff's Ed., 1904), p. 1806. "It shall be unlawful for persons or corporations or their legal representatives to combine or conspire together, or to unite or pool their interests for the purpose

§ 215. **Maine.**—"It shall be unlawful for any firm or incorporated company, or any number of firms or incorporated companies, or any unincorporated company, or association of persons or stockholders, organized for the purpose of manufacturing, producing, refining or mining any article or product, which enters into general use and consumption by the people, to form or organize any trust, or to enter into any combination of firms, incorporated or unincorporated companies, or association of stockholders, or to delegate to any one or more board or boards of trustees or directors the power to conduct and direct the business of the whole number of firms, corporations, companies or associations which may have formed, or which may propose to form a trust, combination or association inconsistent with the provisions of this section and contrary to public policy." ²¹

§ 216. **Maryland.**²²

§ 216a. **Massachusetts.**—"Every contract, agreement, arrangement or combination in violation of the common law in that thereby a monopoly in the manufacture, production or sale in this Commonwealth of any article or commodity in common use is or may be created, established or maintained, or in that thereby competition in this State in the supply or price of any

of forcing up or down the price of any agricultural product or article of necessity for speculative purposes; and the legislature shall pass laws to suppress it." Const., art. 190. As to rebate certificates, see R. S. (Wolff's Ed., 1904), p. 1807.

²¹ R. S. (1903), c. 47, § 53. "No certificate of stock, or other evidence of interest, in any trust, combination or association, as named in § 53, shall have legal recognition in any court in this State, and any deed of real estate given by any person, firm or corporation, for the purpose of becoming interested in such trust, combination or association, or any mortgage given by the

latter to the seller, as well as all certificates growing out of such transaction, shall be void." § 54. By § 55 the penalty is a fine of not less than \$5,000 or more than \$10,000. Compare under Ala. (§ 204); Ill. (§ 209); Iowa (§ 211); Kan. (§ 212); Ky. (§ 213); Mich. (§ 217); Mo. (§ 220).

²² "Monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." Declaration of Rights, art. 41. For similar provisions, see under Ark. (§ 205); N. C. (§ 225); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231); Tex. (§ 232); Wash. (§ 234); Wyom. (§ 236).

such article or commodity is or may be restrained, or prevented, or in that thereby, for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State of any lawful business, trade or occupation is or may be restrained or prevented, is hereby declared to be against public policy, illegal and void." ²³

§ 217. **Michigan.**²⁴

²³ L. 1908, c. 454. By § 2 provision is made for an action by the attorney-general to restrain violation of the act. § 3 relates to evidence.

²⁴ L. 1899, c. 255 (§§ 1-12) is substantially identical with Ohio R. S., §§ 4427 (—1)—4427 (—12) respectively (see § 227); and see under Kan. § 212. In *Attorney-General ex rel. Wolverine Fish Co. v. Booth*, 143 Mich. 89; 106 N. W. 868 (1906), it was sustained as not in contravention of the 14th amendment.

In *Booth v. Davis*, 127 Fed. 875 (C. C. Mich., 1904), where, however, it was not allowed retrospective application, that is, for the purpose of defeating a contract lawful when made, it was said of the act: "It is directed only against combinations of persons, firms, partnerships, corporations or associations of persons conspiring to cooperate in violation of its provisions, and it contains nothing prohibitive of the acquisition by a person, persons, corporation or association, of the business or property of any person or association, natural or artificial. All such persons or associations may acquire property and carry on business at as many different places as their capital will warrant, and fix their prices for their commodities, providing they do

not for that purpose and in its accomplishment, combine with other persons, firms or organizations, to effect any of the ends denounced by the statute." So said with reference to a purchase of the property and good will of a corporation, the stockholders agreeing as an incident of such purchase not to compete with the purchaser. Affirmed as *Davis v. Booth*, 131 Fed. 31; 65 C. C. A. 269 (6th C., 1904).

In *Hunt v. Riverside Co-operative Club*, 140 Mich. 538; 104 N. W. 40; 112 Am. St. Rep. 420 (1905), the prohibition of the act was applied to a combination among more than three-fourths of the master plumbers in Detroit, and all the manufacturers and dealers in plumbers' supplies in that city—by means of an agreement to keep the selling price for both wholesale and retail dealers at a fixed or graduated figure, to create a monopoly in the business of selling plumbers' supplies in Detroit, and to secure to themselves the benefit of that monopoly. But such prohibition was held inapplicable to an agreement to fix the price of labor, unless part of some undertaking within the prohibition of the act. In *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869 (C. C. Mich., 1907), such prohibition was applied in holding unlawful the attempt of a corpora-

§ 218. **Minnesota.**—"No person or association of persons shall enter into any pool, trust agreement, combination, or understanding whatsoever with any other person or association, corporate or otherwise, in restraint of trade, within this State,

tion to secure control of another by purchase of its stock as part of a general plan "to secure control of practically the entire output of lake copper." So held, notwithstanding statutory authority in general terms to purchase stock of another corporation. See under N. Y. (§ 224). As to application of act to corporation organized to carry out illegal combination, see Attorney-General ex rel. Wolverine Fish Co. v. Booth, *supra*. In Attorney-General ex rel. Wolverine Fish Co. v. Booth, 143 Mich. 89; 106 N. W. 868 (1906), §§ 2 and 3 were applied in sustaining a quo warranto proceeding to determine the legality of the incorporation of a foreign corporation. See also, as to proceedings under § 2, Hunt v. Riverside Co-operative Club, *supra*; Bigelow v. Calumet & Hecla Mining Co., *supra*. As to application of § 11 to action by stockholder, see Bigelow v. Calumet & Hecla Mining Co., *supra*.

By L. 1905, c. 329, § 1, are declared illegal contracts "not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited." In Grand Union Tea Co. v. Lewitsky, 153 Mich. 244; 116 N. W. 1090 (1908), this was sustained and held not limited "to such contracts as are within the purview of" the act of 1899, *supra*. By § 2 are declared illegal all combinations to establish and maintain "a monopoly of any trade, pur-

suit, avocation, profession or business." So by § 3 any domestic corporation organized to establish and maintain such a combination. By § 3 a foreign corporation organized for such purpose is prohibited from doing business. By § 6 contracts designed to protect the vendee or transferee of a business, etc., are excepted from the operation of the act. As to such exception, see Grand Rapids Wood Finishing Co. v. Hatt, 152 Mich. 132; 115 N. W. 714 (1908).

A previous act, Compiled Laws (1897), §§ 11377-83, was probably unconstitutional as class legislation. See Davis v. Booth, *supra*; Merz Capsule Co. v. U. S. Capsule Co., 67 Fed. 414 (C. C. Mich., 1895). In Bingham v. Brands, 119 Mich. 255; 77 N. W. 940 (1899), however, it was held constitutional, without considering the point of it being class legislation. See § 181; also under Ga. (§ 207); Ill. (§ 209); Ind. (§ 210); La. (§ 214); Mont. (§ 221); N. C. (§ 225); N. D. (§ 226); Tenn. (§ 231); Tex. (§ 232); Wis. (§ 235). It was applied in Merz Capsule Co. v. U. S. Capsule Co., in holding illegal an agreement among different corporations and individuals engaged in the business of manufacturing and selling gelatine shells and capsules, to pool their interests and form a new corporation. It seems also to have been applied in Detroit Salt Co. v. National Salt Co., 134 Mich. 103; 96 N. W. 1 (1903). So of a contract of a buyer of lambs not

or between the people of this or of any other State or country, or which tends in any way or degree to limit, fix, control, maintain, or regulate the price of any article of trade, manufacture, or use bought and sold within the State, or which limits or tends to limit the production of any such article, or which prevents or limits competition in the purchase and sale thereof, or which tends or is designed so to do.”²⁵

§ 219. **Mississippi.**—“A trust and combine is a combination,

to buy lambs in certain counties within a certain time. *Bingham v. Brands*, supra. So of a contract not to engage in business. *Clark v. Needham*, 125 Mich. 84; 83 N. W. 1027; 51 L. R. A. 785; 84 Am. St. Rep. 559 (1900). But held otherwise of an agreement by the purchaser of property not to compete in business with the vendor. *Hitchcock v. Anthony*, 83 Fed. 779; 28 C. C. A. 80 (6th C., 1897). As to restriction upon competition in insurance business, see *Compiled Laws* (1897), p. 1615. For prohibition of restriction relating to “the sale of any article of machinery, tools, implements, vehicles, or appliances designed to be used in any branch of productive industry,” see L. 1905, c. 229.

²⁵ R. L. (1905), § 5168. The penalty is a fine of not less than \$500 or more than \$5,000, or imprisonment for not less than three or more than five years. For similar provisions, see under Ala. (§ 204); Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Miss. (§ 219); Mo. (§ 220); N. D. (§ 226); S. C. (§ 229); Utah (§ 233). By § 5169 provision is made for the forfeiture of the rights of corporations violating the act, and for an injunction against transaction of business by a corporation pending trial.

As to former act of L. 1899, c. 359, see *Ertz v. Produce Exchange Co.*, 82 Minn. 173; 84 N. W. 743; 51 L. R. A. 825; 83 Am. St. Rep. 419 (1901), where it was held to apply to a corporation composed of dealers in produce. In *Espenson v. Koepke*, 93 Minn. 278; 101 N. W. 168 (1904), this act was held inapplicable to an ordinary vendor's contract in restraint of trade. In *State v. Northern Securities Co.*, 123 Fed. 692 (C. C. Minn., 1903), where was under consideration the same combination as in *Northern Securities Co. v. U. S.*, 193 U. S. 197; 24 Supm. 436; 48 L. Ed. 679 (1904); see § 197), a different conclusion seems to have been reached under the act of 1899, which is like the Federal act. But see reversal in *Minnesota v. Northern Securities Co.*, 194 U. S. 48; 24 Supm. 598; 48 L. Ed. 870 (1904).

By Const., art. 4, § 35 “any combination of persons either as individuals or as members or officers of any corporation, to monopolize the markets for food products in this State, or to interfere with or restrict the freedom of such markets, is hereby declared to be a criminal conspiracy, and shall be punished in such manner as the legislature may provide.”

For prohibition against pooling among carriers, see R. L. (1905), §

contract, understanding, or agreement, express or implied, between two or more persons, corporations, or firms, or associations of persons, or between one or more of either with one or more of the others (a) in restraint of trade; (b) to limit, increase or reduce the price of a commodity; (c) to limit, increase or reduce the production or output of a commodity; (d) intended to hinder competition in the production, importation, manufacture, transportation, sale or purchase of a commodity; (e) to engross or forestall a commodity; (f) to issue, own or hold the certificate of stock of any trust or combine; (g) to place the control, to any extent, of business or the products and earnings thereof, in the power of trustee, by whatever name called; (h) by which any other persons than themselves, their proper officers, agents and employees shall, or shall have the power to, dictate or control the management of business, or (i) to unite or pool interests in the importation, manufacture, production, transportation, or price of a commodity; and is inimical to the public welfare, unlawful and a criminal conspiracy." ²⁶

L. 1907, c. 252, prohibits pooling in business of buying, selling, etc., grain.

As to prohibition of L. 1907, c. 269, against discrimination between sections, communities, etc., for the purpose of creating a monopoly in the business of production, etc., of petroleum, see § 31.

²⁶ Code (1906), § 5002, as amended by L. 1908, c. 119, § 1. For similar provisions, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Neb. (§ 222); N. D. (§ 226); Ohio (§ 227); S. D. (§ 230); Tex. (§ 232); Wis. (§ 235). There follows a provision closely similar to Mo. R. S., § 8966 (L. 1907, p. 378; see § 220), though here the provision is applicable to any "pool, trust," etc., "whether the same is made in this State or elsewhere . . . to regulate or fix in this State, the price,"

etc. Insurance against damage by cyclone and tornado is also specified. For similar provisions, see under Ala. (§ 204); Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Minn. (§ 218); N. D. (§ 226); S. C. (§ 229); Utah (§ 233). It is also here provided that "any corporation, domestic or foreign, or individual, partnership, or association of persons whatsoever (j), who shall restrain, or attempt to restrain, the freedom of trade or production; (k) or who shall monopolize or attempt to monopolize, the production, control or sale of any commodity, or the prosecution, management or control of any kind, class or description of business; (l) or who shall engross or forestall, or attempt to engross or forestall, any commodity; (m) or who shall destroy, or attempt to destroy, com-

§ 220. **Missouri.**—"Any person who shall create, enter into, become a member of, or participate in any pool, trust, agreement, combination, confederation or understanding with any person or

petition in the manufacture or sale of a commodity, by selling or offering same for sale, at a price below the normal cost of production; (n) or who shall destroy, or attempt to destroy competition in the manufacture or sale of a commodity, by selling or offering the same for sale at a lower price at one place in this State than another, differences of freights and other necessary expenses of sale and delivery considered; (o) or who shall destroy or attempt to destroy competition by rendering any service or manipulating, handling or storing any commodity for a less price in one locality than in another, the differences in the necessary expenses of carrying on the business considered shall be deemed and held a trust and combine within the meaning and purpose of this act (and c. 145 of the Code of 1906)," and liable to pains, penalties, etc., accordingly. And it is declared "sufficient to make out a prima facie case of a violation of subd. 'n' hereof to show a sale or offer of sale of a commodity at a lower price at one place in this State than another"; or a violation of subd. 'o' to show a lower charge for the service therein mentioned, in one locality than another." Compare, under Ark. (§ 205); Ga. (§ 207); N. Y. (§ 224); Okla. (§ 228); S. C. (§ 229); Wis. (§ 235). As to constitutionality of former provision, see *State v. Jackson Cotton Oil Co.*, 48 So. 300 (Supm. Ct. Miss., 1909).

With reference to this act, it was said in *Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520, 540; 37 So.

939, 946; 68 L. R. A. 715, 725 (1905): "To vitiate a combination such as the statute condemns, it is essential to show that by its necessary operation it tends to restrain trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition. . . . To vitiate the combination the effect must be detrimental to the interests of the public. . . . We cannot convict the legislature of having intended to prohibit the very many and constantly increasing number of perfectly legitimate contracts or combinations to which the growth of business or the exigencies of commerce give rise, and which are constantly multiplied by new avenues, continually being opened by the thrift, progress and invention of this era of complex business enterprises." Accordingly it was held that the prohibition of the act did not apply to a so-called "car service association"; that (85 Miss. 560; 37 So. 954; 68 L. R. A. 733), it was not "inimical to the public welfare"; did not "infringe upon the rights of the individual or the general well-being of the State"; that it was not "an abandonment of corporate autonomy or a delegation of corporate functions"; that, on the contrary, "its form is lawful, its aim and purpose legitimate, and its effect beneficial to the public, in that its operation tends to stimulate competition in business and increase the benefits arising therefrom."

In *Kosciusko Oil Mill & Fer-*

persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this State, or any article or thing bought or sold

tilizer Co. v. Wilson Cotton Oil Co., 90 Miss. 551; 43 So. 435; 8 L. R. A. N. S. 1053 (1907), the act was applied to a contract to suppress competition in the purchase of cotton seed. This decision was applied in State v. Jackson Cotton Oil Co., *supra*.

In Southern Electric Securities Co. v. State, 91 Miss. 195; 44 So. 785, 124 Am. St. Rep. 638 (1907), a corporation owning and operating street railroad, gas and electric light properties was held illegal as a trust or combination.

By § 5003 "every contract or agreement to enter into or pursue any trust or combine, and every contract or agreement made by another with any trust and combine, or with any member of a trust and combine, for any purpose relative to the business of such trust and combine, is void, and cannot be enforced in any court." This was applied in Kosciusko Oil Mill & Fertilizer Co. v. Wilson, *supra*. By § 5004, for violation of the act, the penalty is a fine of not less than \$200 or more than \$5,000, each day of violation to be a separate offense. By § 5005 "no corporation shall directly or indirectly purchase or own the capital stock, or any part thereof, of any other corporation, nor directly or indirectly purchase, or in any manner acquire the franchise, plant or equipments of any other corporation, if such other corporation be engaged in the same kind of business and be a competitor therein." In case of violation, provision is made for the forfeiture by a domestic corporation of its char-

ter, and by a foreign of its right to do business. In Woodberry v. McClurg, 78 Miss. 831; 29 So. 514 (1901), this was held to prohibit ownership by one corporation of stock in another "and that without any question of competition between them." See Southern Electric Securities Co. v. State, *supra*. See also, under S. C. (§ 229); Tex. (§ 232). By § 5007 provision is made for recovery of \$500 and actual damages by any person injured or damaged by a trust or combine. "He may maintain his action therefor against one or more of the parties to the trust and combine, their attorneys, officers and agents, and that whether or not all parties to the trust and combine be known or whether or not the trust and combine were made or shall exist in this State. And in any suit under this section, proof by any party plaintiff that he has been compelled to pay more for any commodity, or to accept less for any commodity, or to pay more for any service rendered by any corporation exercising a public franchise, by reason of the unlawful act or agreement of the defendant trust, its officers, agents or attorneys, then he would have been compelled to give or accept, but for such unlawful act or agreement, shall be conclusive evidence of damage, and in every such case proof of an unlawful purpose or agreement to raise or lower price or cost shall be conclusive evidence that such price or cost was raised or lowered by reason of such purpose or agreement." For other provisions for recovery of damages, see

whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade." ²⁷ So as to a pool, etc., "to regulate, control, or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience or repair, or any product of mining, or any article or thing whatsoever, of any class or kind bought and sold, . . . or to maintain said price when so regulated or fixed"; so as to a pool, etc., "to fix or limit the amount or quantity of any article of manufacture, mechanism (merchandise), commodity, convenience, repair, any product of mining, or any article or thing whatsoever of any class or kind bought and sold." ²⁸ And so are guilty

under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Mo. (§ 220); Neb. (§ 222); N. M. (§ 223); N. D. (§ 226); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231); Utah (§ 233); Wis. (§ 235). By §§ 5008, 5009 are prohibited combinations with reference to bidding for public works. As to proceedings for violation of anti-trust laws, see §§ 5010-25 (§ 5016 is amended by L. 1908, c. 204). As to liability of corporation for acts done on its behalf, see § 5015.

By Const., art. 198, "the legislature shall enact laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare." See *Yazoo & M. V. R. R. Co. v. Searles*, 85 Miss. 520, 528; 37 So. 939, 942; 68 L. R. A. 715, 721 (1905); *State v. Jackson Cotton Oil Co.*, 48 So. 300 (Supm. Ct. Miss., 1909).

The prohibition of the anti-trust laws was held not to apply to a public contract for supply of school books. *Johnson Publishing Co. v. Mills*, 79 Miss. 543; 31 So. 101 (1902).

For previous anti-trust provisions, see Code (1892), § 1007; c. 140 (see as amended by L. 1896, c.

89; L. 1898, c. 72). For application thereof, to a combination among fire insurance corporations, see *American Fire Ins. Co. v. State*, 75 Miss. 24; 22 So. 99 (1897). See also, as to such provisions, *Barataria Canning Co. v. Jouliau*, 80 Miss. 555; 31 So. 961 (1902). In *Houck v. Wright*, 77 Miss. 476; 27 So. 616 (1899), held not to prohibit exclusive agency within specified territory for sale of goods.

²⁷ R. S., § 8965 (L. 1907, p. 377).

²⁸ R. S., § 8966 (L. 1907, p. 378; with provisions specially applicable to insurance against fire, lightning or storm). For similar provision, see under Ala. (§ 204); Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); N. D. (§ 226); S. C. (§ 229); Utah (§ 233). As to former acts of 1889 and 1891, see *Finck v. Schneider Granite Co.*, 187 Mo. 244; 86 S. W. 213; 106 Am. St. Rep. 452 (1905). As to objection to title of act of 1891, see *State ex inf. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 45; 52 S. W. 595, 608; 45 L. R. A. 363, 376 (1899). As to whether the corresponding former provision was unconstitutional because, of exemption therein as to insurance busi-

of such a conspiracy "any two or more persons, engaged in buying or selling any article of commerce, manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing of any kind or class whatsoever, who

ness, see *State ex inf. Crow v. Continental Tobacco Co.*, 177 Mo. 1, 25, 31; 75 S. W. 737, 743, 746 (1903).

The provisions of a former act were applied in *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247 (1899), to a combination among 30 corporations constituting a large majority of the dealers of lead in the United States; in *State ex inf. Crow v. Armour Packing Co.*, 173 Mo. 356; 73 S. W. 645; 61 L. R. A. 464; 96 Am. St. Rep. 515 (1903), to a combination to fix and maintain the price of dressed beef and pork among those selling to the trade at St. Joseph, St. Louis and Kansas City, from 65 to 80 per cent. of all the dressed beef, and from 50 to 60 per cent. of all the dressed pork handled in those cities; in *Euston v. Edgar*, 207 Mo. 287; 105 S. W. 773 (1907), to a combination among producers of zinc; in *State v. Kansas City Live Stock Exchange*, 211 Mo. 181; 109 S. W. 675 (1908), to a pool or combination to control and limit the trade in live stock on the market of Kansas City. Here was distinguished *Anderson v. U. S.*, 171 U. S. 604; 19 Supm. 50; 43 L. Ed. 300 (1898; see § 190). See *Gladish v. Kansas City Live Stock Exchange*, 113 Mo. App. 726; 89 S. W. 77 (1905).

In *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64; 71 S. W. 691 (1902), the prohibition of the former § 8966 (R. S., 1906), was regarded as applicable to a mere combination among creditors for pro-

tection against delinquent debtor (see § 121), that is, an agreement among the brewery corporations of Kansas City not to sell to anyone in debt for beer to any of their number. The statute seems here recognized (97 Mo. App. 69; 71 S. W. 692) as applicable even to an agreement "necessary to curb unjust or ill-advised competition."

The provisions of the former act were held inapplicable to the business of collecting news and furnishing reports thereof to the newspapers, in *State ex rel. Star Publishing Co. v. Associated Press*, 159 Mo. 410, 466; 60 S. W. 91, 108; 51 L. R. A. 151, 170; 81 Am. St. Rep. 368 (1900); in determining validity of contract involving transportation within scope of commerce clause, in *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242; 74 C. C. A. 462 (8th C., 1906). As to association of undertakers, see *Wagoner Undertaking Co. v. Jones*, 114 S. W. 1049 (Ct. App. Mo., 1908). For application of such provisions to combination among the chief crushed granite dealers in St. Louis, see *Finck v. Schneider Granite Co.*, 187 Mo. 244, 270; 86 S. W. 213, 220; 106 Am. St. Rep. 452 (1905); to creation of corner in wheat, *Albers Commission Co. v. Spencer*, 205 Mo. 105; 103 S. W. 523; 11 L. R. A. N. S. 1003 (1907).

As to application to rules of mutual benefit association, see *Froelich v. Musicians' Mutual Benefit Assoc.*, 93 Mo. App. 383 (1902).

shall create, enter into, become members of or participate in any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing, or to limit competition in such trade by refusing to buy from or sell to any other person any such article or thing aforesaid, for the reason that such other person is not a member of or a party to such pool, trust, combination, confederation, association or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding in such article or thing aforesaid.”²⁹ “All arrangements, contracts, agreements, combi-

In *State ex inf. Crow v. Continental Tobacco Co.*, supra, such provisions were held inapplicable to the case of a mere purchase by a corporation of the assets of another. It was said (177 Mo. 32; 75 S. W. 746): “This statute contemplates the existence of at least two or more corporations, individuals or partnerships, so as to agree or combine with each other to do the prohibited acts mentioned in the statute. In other words, it is intended to operate upon two or more corporations or individuals, who, so far as the public are concerned, indicate that they are pursuing an independent business, legitimate competitors, when in fact there is a secret agreement by which the very things condemned by the statute are accomplished. . . . If this statute is to be construed as prohibiting corporations from purchasing in good faith the assets of another corporation, it must be applied with equal force to the rights and powers of individuals.”

The provisions of the former act against combinations among insurance companies were in *State ex inf. Crow v. Firemen's Fund Ins. Co.*,

supra, held applicable to an arrangement under the guise of a “social club”; so against the objection that such provisions were in violation of the provision of the State constitution against depriving of life, liberty or property, and of the 14th amendment; see also, as to objection that act interferes with vested rights (152 Mo. 46; 52 S. W. 609; 45 L. R. A. 377).

The provisions of such act were in *National Lead Co. v. Grote Paint Store Co.* (p. 271), supra, applied to a foreign corporation, notwithstanding the plea of comity, the court saying that the doctrine of comity “concedes no rights to a corporation of a sister State which are denied by law to a domestic corporation, or which are contrary to the laws or public policy of the State into which the foreign corporation enters for business.” So in *State ex inf. Crow v. Firemen's Fund Ins. Co.*, supra (152 Mo. 21, 50; 52 S. W. 599, 609; 45 L. R. A. 367, 378), the rights of foreign corporations to transact business in the State were declared forfeited.

²⁹ § 8967 (L. 1907, p. 378). In *Gladish v. Kansas City Live Stock*

nations or understandings made, or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade or full and free competition in the importation, transportation, manufacture or sale in this State of any product, commodity or article, or thing bought and sold, of any class or kind whatsoever, are hereby declared to be against public policy, unlawful and void; and any person or persons creating, entering into, becoming a member of or participating in such arrangements, contracts, agreements, combinations or understandings shall be deemed and adjudged guilty of a conspiracy in restraint of trade"; so of arrangements, etc., "to increase, or which tend to increase the market price of any product," etc.³⁰

Exchange, 113 Mo. App. 726; 89 S. W. 77 (1905), the former provision was held inapplicable to enforcement of a rule of a "live stock exchange" against dealing with expelled member. As to application to mere boycott of trade competitor, see *Walsh v. Association of Master Plumbers*, 97 Mo. App. 280, 290, 294; 71 S. W. 455, 458, 459 (1902).

³⁰ § 8968 (L. 1907, p. 378). For similar provisions, see under Kan. (§ 212); N. D. (§ 226); S. D. (§ 230); Tenn. (§ 231). The "article" here referred to includes §§ 8965-77. There are included in § 8968 provisions specially applicable to insurance against fire, lightning or storm. For application of former provision, see *Hastings Industrial Co. v. Baxter*, 125 Mo. App. 494; 102 S. W. 1075 (1907). By § 8969 provision is made by way of penalty, for imprisonment not exceeding five years, or a fine of not less than \$500 or more than \$1,000, or both.

As to former provision of § 8969 (R. S., 1906) providing that "any

contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void," see *Albers Commission Co. v. Spencer*, 205 Mo. 105; 103 S. W. 523; 11 L. R. A. N. S. 1003 (1907); *Euston v. Edgar*, 207 Mo. 287; 105 S. W. 773 (1907).

By § 8970 provision is made for proceedings to restrain violations of the act "and of any other law concerning pools, trusts and conspiracies and unlawful combinations." That such an injunction will not be allowed to a mere individual, see *Walsh v. Association of Master Plumbers*, *supra* (97 Mo. App. 291; 71 S. W. 458). By §§ 8971, 8975 provision is made for the forfeiture of the rights and franchises of a corporation, foreign or domestic, violating the provisions of the act. By § 8972 "any person injured in his business or property by any other person or persons by reason of anything forbidden or declared to be unlawful by this act, may sue therefor . . . and shall recover threefold the damages by him sustained, and the costs of suit, in-

§ 221. **Montana.**—"No incorporation, stock company, person or association of persons in the State of Montana, shall directly or indirectly combine or form what is known as a trust, or make any contract with any person or persons, corporations or stock companies, foreign or domestic, through their stockholders, trustees or in any manner whatever, for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil for consumption by the people. The

cluding a reasonable attorney's fee." For similar provisions, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Neb. (§ 222); N. M. (§ 223); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231); Utah (§ 233); Wis. (§ 235). The remedy under the former provision was held exclusive in *Albers Commission Co. v. Spencer*, 205 Mo. 105; 103 S. W. 523; 11 L. R. A. N. S. 1003 (1907), denying equitable relief against contract. §§ 8973, 8974 are the same in effect as Ill. L. 1891, p. 206, §§ 2, 6 respectively. In *National Lead Co. v. Grote Paint Store Co.*, supra, what is now § 8974 was applied, it being held proper to receive evidence tending to show the real objects of the incorporation of the plaintiff and the nature of its business. Here was followed *Ford v. Chicago Milk Shippers' Assoc.*, 155 Ill. 166; 39 N. E. 651; 27 L. R. A. 298 (1895; see § 209). It was also applied in *Heim Brewing Co. v. Belinder*, 97 Mo. App. 64; 71 S. W. 691 (1902). See also *Albers Commission Co. v. Spencer*, supra. As to application of word "person," as used in the act, see § 8976. As to when it is unnecessary to allege or plead how, or where or when a pool, etc., was made or effected, see §§ 8977, 8977b. As to when a witness may not refuse to

answer, or refuse to produce books or papers, see §§ 8977a, 8983. As to effect of violation of law prior to taking effect of act, see § 8977c.

§§ 8978-81 (L. 1907, p. 374) seem to be to substantially the same effect as the provisions added by L. 1893, p. 89, to the Illinois act of 1891 (see § 209). In *State ex rel. v. Simmons Hardware Co.*, 109 Mo. 118; 18 S. W. 1125; 15 L. R. A. 676 (1891), the corresponding provisions of the former act of 1889 were held in violation of the constitutional provision that "no person shall be compelled to testify against himself in a criminal cause." By §§ 8982-82b (L. 1907, p. 376) provision is made as to the duty and compensation of prosecuting officers. By §§ 8983-5 provision is made for taking testimony in proceedings against pools, trusts, monopolies, etc. In *State ex inf. Crow v. Continental Tobacco Co.*, 177 Mo. 1, 24, 42; 75 S. W. 737, 743, 749 (1903), the question of the constitutionality of these provisions was raised, but not decided, though they were held unconstitutional below. By §§ 8986-91 provision is made for taking testimony for the purpose of determining whether a proceeding should be commenced against any pool, trust, etc.

legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, and in case of foreign corporations prohibiting them from carrying on business in the State.”³¹

§ 222. **Nebraska.**—“A trust is a combination of capital, skill or acts by any person or persons to fix the price of any article or commodity of trade, use or merchandise, with the intent to prevent others from conducting or carrying on the same business, or selling or trafficking in the same article, use or merchandise, or a combination of capital, skill or acts by two or more persons, or by two or more of them for either or all of the following purposes: (1) To create or carry out restrictions in trade. (2) To limit or reduce the production, or increase or reduce the price of merchandise or commodities. (3) To prevent competition in insurance, either life, fire, accident or any other kind, or in manufacture, making, constructing, transportation, sale or purchase of merchandise, produce or commodities. (4) To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established upon any article of merchandise, produce or manufacture of any kind intended for sale, use or consumption in this State; to establish any pretended agency whereby the sale of any such article, commodity, merchandise or product shall be covered up,

³¹ Const., art. 15, § 20. For similar provisions, see under Idaho (§ 208).

See Rev. Codes (1907), § 6654 as to injunction pending action to enforce such provision.

The effect of § 20 was considered in *MacGinniss v. Boston, etc., Consolidated Copper v. Mining Co.*, 29 Mont. 428, 454; 75 Pac. 89, 95 (1904). Its prohibition and that of Rev. Codes (1907), § 8285, *infra*, were here held not to apply to a transaction by which a foreign (New Jersey) holding corporation

acquired by means of exchange, the majority of the stock of a number of domestic corporations as well as of others engaged in mining.

§ 8285 was in *State v. Cudahy Packing Co.*, 33 Mont. 179; 82 Pac. 833; 114 Am. St. Rep. 804 (1905), held unconstitutional because of the exception in § 8289 of combinations among laborers. See § 181; also under Ill. (§ 209); Ind. (§ 210); La. (§ 214); Mich. (§ 217); Neb. (§ 222); N. C. (§ 225); N. D. (§ 226); Tenn. (§ 231); Tex. (§ 232); Wis. (§ 235).

concealed or made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor, producer or manufacturer to control the wholesale or retail price of any such article of merchandise, product or commodity after the title to the same shall have passed from such vendor or manufacturer. (5) To make or enter into, carry on or carry out any contract, obligation or agreement of any kind or description by which they shall bind, or have heretofore bound themselves, not to sell, dispose of, traffic in or transport any article of merchandise or commodity, or article of trade, product, use, merchandise, consumption or commerce, below a common standard figure, card or list price, or by which they shall agree in any manner to keep the price of such article, product, commodity or transportation at a fixed or graduated figure or price, or by which they shall in any manner establish or settle the price of any article of merchandise, commodity, or of insurance, fire, life or accident, or transportation between them or between themselves or others, or with the intent to preclude, or the tendency of which is to prevent or preclude a free and unrestricted competition among themselves or others or the people generally, in the production, sale, traffic or transportation of any such article of merchandise, product or commodity, or conducting a like business or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale, production or transportation of any such article or merchandise, product or commodity, or the carrying on of any such business that its price might in any manner be affected thereby." ³²

³² L. 1897, c. 79, § 1; Stat. (Cobey's Ed., 1903), § 11500. For similar provisions, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); N. D. (§ 226); Ohio (§ 227); S. D. (§ 230); Tex. (§ 232); Wis. (§ 235).

In *State v. Omaha Elevator Co.*, 75 Neb. 637; 106 N. W. 979 (1906); subsequent proceeding in 75 Neb.

654; 110 N. W. 874 (1906), § 1 of the act of 1897 was held to be still in force, though the rest of the act was repealed by the act of 1905, *infra*. The act of 1897 was held constitutional in *Cleland v. Anderson*, 66 Neb. 252; 92 N. W. 306; 5 L. R. A. N. S. 136 (1902), disapproving *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816 (C. C.

§ 222a. **New Hampshire.**³³

§ 223. **New Mexico.**—"Every contract or combination between individuals, associations or corporations, having for its

Neb., 1897), where it was held unconstitutional as interfering with liberty of contract, *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; 17 Supm. 540; 41 L. Ed. 1007 (1897), being distinguished as a case of a statute upheld under the commerce clause of the Federal constitution. As to constitutionality of provision of act of 1897 as to attorneys' fee, see *Niagara Fire Ins. Co. v. Cornell*, supra. As to effect of exemption as to "assemblies or associations of laboring men," see *Cleland v. Anderson*, supra, where the act was sustained against the objection that it was unconstitutional because of such exemption, but see to the contrary, *Niagara Fire Ins. Co. v. Cornell*, supra. See § 181; also under Ill. (§ 209); La. (§ 214); Mich. (§ 217); Mont. (§ 221); N. C. (§ 225); Wis. (§ 235).

By L. 1905, c. 162, § 1, "every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State is hereby declared to be illegal" (under a penalty of a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both). By § 2 "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, within this State, shall be deemed guilty of a misdemeanor" (under the same penalty

as under § 1). In *State v. Adams Lumber Co.*, 116 N. W. 302 (Supm. Ct. Neb., 1908), following *U. S. v. Trans-Missouri Freight Assoc.*, 166 U. S. 290; 17 Supm. 540; 41 L. Ed. 1007 (1897), this act was held applicable to reasonable as well as unreasonable contracts in restraint of trade, in this case, to a combination among retail dealers in lumber to prevent competition of wholesale dealers in selling directly to consumers. To similar effect under former act, *Cleland v. Anderson*, 66 Neb. 252; 92 N. W. 306; 5 L. R. A. N. S. 136 (1902). See *Jackson v. Stanfield*, 137 Ind. 592; 36 N. E. 345; 23 L. R. A. 588 (1894; see § 34), where similar conditions were under consideration.

In *Mollyneaux v. Wittenberg*, 39 Neb. 547; 58 N. W. 205 (1894), the prohibition of the former act of 1889 against "pools" and "trusts" was held not to apply to an agreement in a deed that the vendee should not use the property described for "hotel purposes for two years."

In *Downing v. Lewis*, 56 Neb. 386; 76 N. W. 900 (1898); see subsequent decision in 59 Neb. 38; 80 N. W. 261 (1899), the act of 1889 was held inapplicable to the ordinary contract of a vendor not to engage in business of the character of that sold. See under Tex. (§ 232).

By § 3 of the act of 1905 "any property owned under any contract

³³ See Const., art. 82, for grant of power to legislature to enact

laws to prevent restrictions upon competition.

object or which shall operate to restrict trade or commerce or control the quantity, price or exchange of any article of manufacture or product of the soil or mine, is hereby declared to be

or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in the foregoing sections of this act, shall be forfeited to the State." By § 4 an annual statement is required from certain corporations, including a statement of stock owned by such a corporation in other corporations, etc., and of its own stock held by other corporations, etc. By § 5 may be required from a corporation by the attorney-general "any statement he may think fit, in regard to the conduct of its business"; also "a list of all contracts or transactions . . . in which it has sold any article of (or?) product or carried any article or product within this State at a rate less than the ordinary market price, of (if?) such article or product had been sold or carried by any other person than the party to such transaction." By § 6 it is a misdemeanor to enter into any contract, combination or conspiracy "for the purpose of drawing (driving?) out of business any other person engaged therein"; so to "for such purpose in the course of such business, sell any article or product at less than its fair market value, or at a less price than it is accustomed to demand or receive therefor in any other place under like conditions; or sell any article upon a condition, contract or understanding that it shall not be sold again by the purchaser, or restrain such sale by the purchaser" (under the same penalty as under § 1). By § 7 "no corporation, joint stock com-

pany or other association, shall engage in business within this State, a majority of whose stock is owned by or controlled or held in trust for any manufacturing or other corporation which in the course of its manufacture or production conducts its business or any part thereof, in a manner which would be prohibited by this act, if it were so conducted in the course of such business within this State." By § 8 provision is made for inspection of corporate books, etc. See § 9 as to application of act to officers of corporation; § 11 for prohibition of corporation, etc., twice adjudged to have violated the act, and thereafter violating it, to engage in business. By § 12 the penalty for violation of the act is, in addition to penalty for contempt, the same as under § 1. See § 13 as to personal liability of officers for corporate debts; §§ 14, 15 for prohibition of rebates in transportation by carriers. And by § 15 if any corporation, etc., "shall offer, grant or give any special prices, inducements or advantages for the sale of articles produced, manufactured, owned or controlled by it, to purchasers in any particular locality, in order to restrict or destroy competition in that locality in the sale of such articles, it shall be unlawful thereafter to transport within this State any article owned or controlled by it, or produced or manufactured by it, by whomsoever the same may be owned or controlled." See §§ 16, 17 as to procedure in courts of equity. By § 18 threefold damages

illegal.³⁴ "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce of this territory, shall be deemed guilty of a misdemeanor."³⁵

§ 224. **New York.**—"Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this State of any article or commodity of common use³⁶ is or may be created, established or maintained, or whereby competition in this State in the supply or price of any such article or commodity is or may be restrained or pre-

may be recovered by "any person who shall be injured in his business or property by reason of anything forbidden or declared to be unlawful by this act." For similar provisions, see under Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Mo. (§ 220); N. M. (§ 223); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Utah (§ 233); Wis. (§ 235).

L. 1897, c. 80 (§§ 11513-6; see also §§ 2358-60), relates solely to restrictions upon competition in the

business of dealing in grain; see *State v. Omaha Elevator Co.*, 75 Neb. 637; 106 N. W. 979 (1906).

L. 1897, c. 81 (§§ 11517-20), relating to fire insurance was held unconstitutional in *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816 (C. C. Neb., 1901).

L. 1893, c. 49 (§§ 11521-3), relates to dealing in lumber and coal; L. 1907, c. 156, to pooling of bridge contractors, etc.

³⁴ Comp. Laws (1897), § 1292. The penalty is a fine not exceeding \$1,000 or less than \$100, and imprisonment not exceeding one year or until the fine is paid.

³⁵ *Id.*, § 1293. The penalty is a fine not exceeding \$1,000 or imprisonment not exceeding one year or both. By § 1294 (as amended by L. 1907, c. 18) contracts and agreements in violation of §§ 1292 and 1293 are void and there is given a right of action for damages occasioned by violation of such provisions. For similar provisions, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Mo. (§ 220); Neb. (§ 222); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Utah (§ 233); Wis. (§ 235).

Moreover "any purchaser of any commodity from any individual, corporation or association transacting business in violation of this act shall not be liable for the payment for such commodity." For similar provisions, see under Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Mo. (§ 220); N. D. (§ 226). See also under Kan. (§ 212).

As to restrictions upon competition in railroad business, see § 3910. L. 1899, c. 50, relates to sale of coal oil.

³⁶ In *Matter of Jackson*, 57 Misc. 1; 107 N. Y. Suppl. 799 (Supm. Ct., Sp. T., 1907), held not to include service of transmission by telegraph.

vented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this State of the manufacture, production or sale of any such article or commodity, the free pursuit in this State, of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void." ³⁷

³⁷ L. 1899, c. 690, § 1 (Birds-eye's R. S., 3d ed., p. 2405). See article in 4 Columbia Law Rev. 83 (1904) by T. D. Kenneson.

In *Matter of Davies*, 168 N. Y. 89, 100; 61 N. E. 118, 120; 56 L. R. A. 855, 859 (1901), the act was held to be a substantial continuation of the act of 1897 here-in repealed, as to effect of which see *Brooklyn Distilling Co. v. Standard Distilling, etc., Co.*, 120 App. D. 237; 105 N. Y. Suppl. 264 (1907). It was also held in *Matter of Davies* to apply to combinations already formed, but still maintained and in process of consummation. It was said of the act with reference to its object, that it is "little more than a codification of the common law upon the subject and its validity to this extent is not and cannot be successfully questioned." As to civil liability there-under, see *Rourke v. Elk Drug Co.*, 75 App. D. 145; 77 N. Y. Suppl. 373 (1902).

By L. 1892, c. 688, § 7 (Birds-eye's R. S., 3d ed., p. 3410) "no domestic stock corporation and no foreign corporation doing business in this State shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life." Compare under Ga. (§ 207); Miss. (§ 219); Okla. (§ 228); Tex. (§ 232); Wis. (§ 235); Wyom. (§ 236).

In *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945, 958 (C. C. N. Y., 1908), § 7 was applied in holding illegal a combination "in the exclusive control of the business of constructing, repairing, managing, and operating railroads and transporting passengers by railroad between the Bronx and the Battery and intermediate points in the city of New York so as to absolutely exclude competition in that business in that place or territory." Such combination, effected by transfer of stock of competing corporations to a "holding corporation" was held not legalized by § 40 of the Stock Corporation Law conferring upon a corporation general power to hold stock in another. To like effect, *Burrows v. Interborough Metropolitan Co.*, 156 Fed. 389 (C. C. N. Y., 1897). To the contrary, *Attorney-General v. Consolidated Gas Co.*, 124 App. D. 401; 108 N. Y. Suppl. 823 (1908); affirming *Re Consolidated Gas Co.*, 56 Misc. 49; 106 N. Y. Suppl. 407 (1907); *Matter of Attorney-General*, 125 App. D. 804; 110 N. Y. Suppl. 186 (1908), where, in view of § 40, the combination was held not within the prohibition of § 7. See under Mich. (§ 217); article in 40 Am. Law Rev. 558 (1906) by E. L. Andrews. See also, as to § 7, *Alexandria Bay Steamboat Co. v. N. Y. Central, etc., R. R. Co.*, 18 App. D. 527; 45 N. Y. Suppl. 1091 (1897); *National Har-*

§ 225. **North Carolina.**—"Perpetuities and monopolies are

row Co. v. Bement, 21 App. D. 290; 47 N. Y. Suppl. 462 (1897); Rafferty v. Buffalo City Gas Co., 37 App. D. 618; 56 N. Y. Suppl. 288 (1899); People ex rel. Morse v. Nussbaum, 55 App. D. 245, 253; 67 N. Y. Suppl. 492, 497 (1900); reversing 32 Misc. 1; 66 N. Y. Suppl. 129 (1900).

In *Watson v. Harlem & N. Y. Navigation Co.*, 52 How. Pr. 348 (Supm. Ct. Sp. T., 1877), a statutory prohibition against "combining" of navigation companies, was held not limited to combination "as respects the commission of unlawful acts," but to prevent the creation or formation of monopolies, by the union or combination of such companies.

In *Straus v. American Publishers' Assoc.*, 177 N. Y. 473; 69 N. E. 1107; 64 L. R. A. 701; 101 Am. St. Rep. 819 (1904), where the court may have overlooked the general rule that no civil liability results from the existence of a mere restriction upon competition (see § 164), the act of 1899 (which makes no provision for civil liability to a mere individual) was held applicable to holding an action maintainable for what was in essence a boycott of a trade competitor (see § 34). See subsequent decisions in 92 App. D. 350; 86 N. Y. Suppl. 1091 (1904); 193 N. Y. 496; 86 N. E. 525 (1908); dissenting opinion in *Park v. National Wholesale Druggists' Assoc.*, 175 N. Y. 1, 35; 67 N. E. 136, 148; 62 L. R. A. 632, 647; 96 Am. St. Rep. 578 (1903); *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, 168 (C. C. N. Y., 1905; involving same state of facts as in *Straus v. American*

Publishers' Assoc.). As to application of act to boycott by employee, see *People v. McFarlin*, 43 Misc. 591; 89 N. Y. Suppl. 527 (Monroe County Ct., 1904).

In *Walsh v. Dwight*, 40 App. D. 513; 58 N. Y. Suppl. 91 (1899), a provision of the former act of 1893 (substantially embodied in that of 1899) was held not to make invalid agreements between manufacturers and their customers by which the price to be paid by the latter was reduced in consideration of their agreeing not to sell for less than a certain price, and not to sell the goods of other manufacturers for less than that at which they agreed to sell the defendants' goods. The decision is, however, sustainable on the additional ground that no civil liability results merely from the existence of an illegal restriction upon competition. See § 164.

By § 2 of the act of 1899 the penalty is a fine not exceeding \$5,000, or imprisonment not longer than one year, or both; in case of a corporation, only a fine. By § 3 provision is made for an action by the attorney-general to restrain the acts declared illegal; by §§ 4-7 for an examination for the purpose of obtaining testimony. See *People v. American Ice Co.*, 54 Misc. 67; 105 N. Y. Suppl. 650 (Supm. Ct., Sp. T., 1907). In *Matter of Davies*, supra, the provisions of § 4 were sustained against the objection that they imposed other than judicial duties upon a judicial officer; also against the objection that they constituted an invasion of personal liberty as guaranteed by the constitution.

contrary to the genius of a free State, and ought not to be allowed." ³⁸

§ 226. **North Dakota.**—"Any corporation organized under

The provision conferring on a referee power to take testimony was also here sustained. Here was reversed 55 App. D. 245; 67 N. Y. Suppl. 492 (1900), which reversed 32 Misc. 1; 66 N. Y. Suppl. 492 (1900). As to effect of provision of act of 1897 for examination of witnesses, see *Matter of Attorney-General*, 22 App. D. 285; 47 N. Y. Suppl. 883 (1897). As to the prohibition in Penal Code, § 168, subd. 6, against a conspiracy "to commit any act injurious to trade or commerce," see *Leonard v. Poole*, 114 N. Y. 371; 21 N. E. 707; 4 L. R. A. 728; 11 Am. St. Rep. 667 (1889); *People v. Sheldon*, 139 N. Y. 251; 34 N. E. 785; 23 L. R. A. 221; 36 Am. St. Rep. 690 (1893); *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401; 58 N. E. 525; 52 L. R. A. 262; 79 Am. St. Rep. 655 (1900); dissenting opinion in *Park v. National Wholesale Druggists' Assoc.*, 175 N. Y. 1, 35; 67 N. E. 136, 148; 62 L. R. A. 632, 647; 96 Am. St. Rep. 578 (1903); *Kellogg v. Sowerby*, 190 N. Y. 370; 83 N. E. 47 (1907); *People v. McFarlin*, 43 Misc. 591; 89 N. Y. Suppl. 527 (*Monroe County Ct.*, 1904). In *People v. Klaw*, 55 Misc. 72; 106 N. Y. Suppl. 341 (N. Y. Co. Gen. Sess., 1907), subds. 5 and 6 were held inapplicable to agreements among those engaged in business of owning, controlling and leasing theaters, and producing plays and entertainments of the stage, and booking of contracts for production of plays.

The incapacity of a corporation

to *conspire* was, in *People v. Duke*, 19 Misc. 292; 44 N. Y. Suppl. 336 (N. Y. Co. Gen. Sess., 1897), held to furnish no obstacle to an indictment thereunder against its officers and agents.

For prohibition of restriction upon competition in transportation between this country and Europe, see L. 1899, c. 727 (*Birdseye's R. S.*, 2d ed., p. 3785).

³⁸ Const., art. 1, § 31. For similar provisions, see under Ark. (§ 205); Md. (§ 216); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231); Tex. (§ 232); Wash. (§ 234); Wyom. (§ 236). In *Thrift v. Elizabeth City*, 122 N. C. 31; 30 S. E. 349; 44 L. R. A. 427 (1898), this provision was held applicable to a grant by a municipal corporation of exclusive privilege to construct and maintain water works. As to application to statute limiting practice of medicine and surgery, see *State v. Biggs*, 133 N. C. 729; 46 S. E. 401; 64 L. R. A. 139; 98 Am. St. Rep. 731 (1903); to provision for regulation of pilots, *St. George v. Hardie*, 147 N. C. 88; 60 S. E. 920 (1908).

By Revisal (1905), § 3739, "if any person in any way violate any of the provisions of the law against trusts and monopolies, he shall be guilty of a misdemeanor." This seems taken from § 12 of L. 1901, c. 586, which act was probably unconstitutional for reasons stated in § 181, *supra*; see also under Ga. (§ 207); Ill. (§ 209); Ind. (§ 210); Mich. (§ 217); Mont. (§ 221); Neb. (§ 222); N. D. (§ 226);

the laws of this State or any other State or country for transacting or conducting any kind of business in this State, or any partnership, association or individual, creating, entering into or becoming a member of, or a party to any pool, trust, agreement, contract, combination, confederation, or individual, to regulate or fix the price of any article of merchandise, commodity or property, or to fix or limit the amount or quantity of any article, property, merchandise or commodity to be manufactured, mined, produced, exchanged or sold in this State, shall be guilty of a misdemeanor.”³⁹ “A pool or a trust is a combination of capital, skill or acts by two or more persons, corporations or associations of persons, or two or more of them for either, any or all of the following purposes: (1) To create or carry out restrictions in trade. (2) To limit or reduce the production, or increase or reduce the price of property, merchandise or commodities. (3) To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, upon any property, article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such property, article or commodity shall be covered up or made to appear to be for the original vendor, for a like purpose or purposes. (4) To make or enter into or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any property, commodity or article of trade, use, merchandise, commerce or consumption, below a common standard figure, or card price list, or by which they shall agree, in any manner to keep the price of such article,

Tenn. (§ 231); Tex. (§ 232); Wis. (§ 235).

For prohibition against pooling of railroad freight, see Revisal (1905), § 3762.

³⁹ L. 1907, c. 259, § 1. For sim-

ilar provisions, see under Ala. (§ 204); Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Minn. (§ 218); Miss. (§ 219); Mo. (§ 220); S. C. (§ 229); Tex. (§ 232); Utah (§ 233).

commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any property, article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any article or commodity that its price might be in any manner affected." ⁴⁰

§ 227. **Ohio.**⁴¹

⁴⁰ L. 1907, c. 259, § 2. For similar provisions, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Neb. (§ 222); Ohio (§ 227); S. D. (§ 230); Tex. (§ 232); Wis. (§ 235).

By § 3 provision is made for a fine of not less than \$100 or more than \$5,000; by § 4 for a fine of not exceeding \$2,000 or imprisonment for a year or both; by § 5 for forfeiture of the right of a corporation to do business.

As to sufficiency of information or indictment, see § 6; of proof in prosecution, § 7.

"Any contract or agreement in violation of the provisions of this chapter shall be absolutely void and not enforceable either in law or in equity." § 8.

"No purchaser of any property, article or other commodity from any individual, company, association of individuals or corporation transacting business contrary to any provision of the preceding sections of this chapter, shall be liable for the price or payment of such property, article or commodity, and may

plead this chapter as a defense in any suit for such price or payment."

§ 9. For similar provisions, see under Ark. (§ 205); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Mo. (§ 220); N. M. (§ 223). See also under Kan. (§ 212). As to taking testimony, see §§ 10, 11; injunction against disposing of assets, § 12.

By Const., § 146, "any combination between individuals, corporations, associations or either, having for its object or effect, the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy; and any and all franchises heretofore granted or extended, or that may hereafter be granted or extended in this State, whenever the owner or owners thereof violate this article shall be deemed annulled, and become void." For a similar provision, see under Utah (§ 233).

⁴¹ R. S., § 4427 (—1), seems substantially identical with Kan. G.

§ 228. **Oklahoma.**—"Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this State, which is against

S. (Dassler's Ed., 1905), § 4464; see also under Mich. (§ 217). Subds. 1-3, however, of § 4427 (—1) are as follows: "(1) To create or carry out restrictions in trade or commerce. (2) To limit or reduce the production, or increase or reduce the price of merchandise or any commodity. (3) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity." And subd. 5 contains no reference to contracts not to manufacture. §§ 4427 (—1) and the provisions following constitute the act of 1898, which was held constitutional in *State v. Gage*, 72 Ohio St. 210; 73 N. E. 1078 (1905), which reversed *Gage v. State*, 24 Ohio Cir. Ct. R. 724 (Del. C. C., 1903). It had also been held constitutional in *State ex rel. Monnett v. Buckeye Pipe Line Co.*, 61 Ohio St. 520; 56 N. E. 464 (1900), so far, at least, as applicable to the agreement there under consideration, characterized as "having no purpose whatever except to prevent competition in the production, transportation and refining of petroleum, to the end that there may be received from the consumers of its products higher prices than would prevail under the condition of open competition." Such an agreement was regarded as "hurtful to the public" so as to be within the power of the legislature to prohibit in the exercise of the police power, notwithstanding constitutional guaranties of the rights of liberty and property. In *Fisher v. Flickinger*

Wheel Co., 28 Ohio Cir. Ct. R. 501 (1906), the act was applied to a combination among manufacturers of wood wheels for vehicles.

In *State v. Jacobs*, 7 Ohio N. P. 261 (Cleveland Police Court, 1900?), a boycott apparently unaccompanied with acts of violence, was held unlawful as a violation of the prohibition against a combination "to create or carry out restrictions in trade or commerce." See under Ind. (§ 210); Mo. (§ 220); S. C. (§ 229); Tex. (§ 232). In *Kevil v. Standard Oil Co.*, 8 Ohio N. P. 311 (Cin. Super Ct., 1901), the prohibition of the act was held inapplicable to an agreement for exclusive employment, that is, one by which one engaged in business should abandon it and be employed by another, though it appeared that the proposed employer (the Standard Oil Company) was a member of the Standard Oil Trust by which was controlled "the entire oil business in the United States." As to covenant by lessee not to sell any beer except of the manufacture of the lessor, see *Huebner-Toledo Breweries Co. v. Singlar*, 28 Ohio Cir. Ct. R. 329 (1906).

By § 4427 (—2) provision is made for forfeiture of the rights and for the dissolution of an offending corporation; so by § 4427 (—3) for depriving an offending foreign corporation of the right to do business. See as to proceedings against corporations, *State ex rel. v. King Bridge Co.*, 28 Ohio Cir. Ct. R. 147 (1906). The penalty is a fine of not less than \$50 or more than

public policy, is hereby declared to be illegal." ⁴² It is declared unlawful "to issue or to own trust certificates," or "to enter into any combination, contract or agreement . . . the purpose or effect of which . . . shall be to place the management

\$5,000 or imprisonment for not less than 6 months or more than one year or both. Each day's violation constitutes a separate offense. See also § 4427 (—7). As to allegations in indictment, see § 4427 (—5). As to sufficiency of indictment, see *Gage v. State*, 24 Ohio Cir. Ct. R. 724 (Del. C. C., 1903); *Hughes v. State*, 29 Id. 237 (1907; see also, as to county in which one may be indicted). In *Hammond v. State*, 78 Ohio St. 15; 84 N. E. 416; 15 L. R. A. N. S. 906 (1908), § 4427 (—6), providing that "the character of the trust or combination alleged may be established by proof of its general reputation as such" was held invalid as in violation of the 14th amendment. See also, under Mich. (§ 217); *State v. Jacobs*, supra. By a provision added by L. 1906, p. 313, provision is made as to testimony and production of books, etc. By § 4427 (—8) any contract or agreement in violation of the provisions of the act "shall be absolutely void and not enforceable either in law or equity." This was applied in *Fisher v. Flickinger Wheel Co.*, 28 Ohio Cir. Ct. R. 501 (1906). § 4427 (—10) seems substantially identical with Ill. L. 1891, p. 206, § 2 (see § 209), except that the prohibition here applies to "persons, partnerships and associations" as well as to corporations. The penalty is a fine of not less than \$50 or more than \$1,000. By § 4427 (—11) a person injured in his business or property by reason of

anything forbidden or declared to be unlawful by the act may recover twofold the damages. For similar provisions, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Mo. (§ 220); Neb. (§ 222); N. M. (§ 223); Okla. (§ 228); S. D. (§ 230); Utah (§ 233); Wis. (§ 235). See *Barron v. Pittsburg Plate Glass Co.*, 7 Ohio N. P. 528 (Cin. Super. Ct., 1900). As to definition of "person," see § 4427 (—12).

As to effect of § 3256 as to holding stock in other corporations, see § 155, supra. By § 3256b (added by L. 1906, p. 229) is prohibited the sale of the property of a corporation "for the formation of or to any trust or combination for the purpose of restricting trade or competition."

⁴² G. S. (1908), § 6679. By Const., art. 5, § 44, "the legislature shall define what is an unlawful combination, monopoly, trust, act or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination." By G. S., § 6680 provision is made as to the duties of the attorney-general; also for an injunction and appointment of a receiver. By § 6681 threefold damages may be recovered for injury in business or property by reason of anything forbidden or declared to be unlawful by the act. For similar provisions, see under

or control of such combination or combinations, or the conduct or operation of the same, or the output or manufactured product thereof, or the marketing of the same in the hands of any trust or trustees, holding corporation or association, firm or committee, with the intent or effect to limit or fix the price, or lessen the production or sale of any product or article of commerce, or the use or consumption of the same, or to prevent, restrict, limit or diminish the manufacture or output of any such article of commerce, use or consumption.”⁴³

Cal. (§ 206); Ind. (§ 210); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Mo. (§ 220); Neb. (222); N. M. (§ 223); Ohio (§ 227); S. D. (§ 230); Utah (§ 233); Wis. (§ 235). By § 6682 a foreign corporation violating the act is denied the right to do business in the State. By § 6683 it is prohibited to discriminate by sale, etc., at a lower rate in one section, etc., than another, “or at the same rate or price at a point away from that of production or manufacture as at the place of production or manufacture,” “if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition, or restriction of trade.” See also Const., art. 9, § 45, in part here embodied.

For instances of similar legislation, see § 31, *supra*. By § 6684 the penalty is a fine of not less than \$50 or more than \$10,000 and imprisonment for not less than 10 days or more than 10 years, each day’s violation to constitute a separate offense. Provision is also made for recovery of a penalty in a civil action. By § 6685 “in any indictment or information for any offense named in this act, it is sufficient to state the purpose or facts of the trust, monopoly, unlawful combination in restraint of trade or

commerce, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its purpose without giving its name, or description or stating how, when or where it was created.” By § 6686 provision is made as to witnesses; by § 6687 as to duty of prosecuting officers.

⁴³ Id., § 6688, the provisions of § 6684 being made applicable. By Const., art. 9, § 41, “no corporation chartered or licensed to do business in this State shall own, hold, or control, in any manner whatever, the stock of any competitive corporation or corporations engaged in the same kind of business, in or out of the State, except such stock as may be pledged,” etc. By G. S., § 6689 of the act of 1907 a corporation violating such provision forfeits its right to do business in the State, besides being subject to a penalty of not less than \$1,000 or more than \$10,000. Compare under Ga. (§ 207); Miss. (§ 219); N. Y. (§ 224); Tex. (§ 232).

By § 6690 provision is made as to the liability of the property of a corporation for fines or penalties. By § 6691 “whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public

§ 229. **South Carolina.**—"Any corporation organized under the laws of this or any other State or country and transacting or conducting any kind of business in this State, or any partnership or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product

must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of § 1 (6679), said business is a public business, and subject to be controlled by the State, by the corporation commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges." See also as to duty to render services or offer commodities "without discrimination and adequately to the needs of the public." By § 6692 "in all prosecutions or proceedings under this act, it shall be sufficient to prove that a trust, monopoly, combination in restraint of trade or commerce existed without the period not barred by the statute of limitations, and was not continued in any form into and during any portion of the period not so barred, and that the defendant belonged to it, or acted for or in connection with it without proving all the members belonging to it, or proving or pro-

ducing any article or agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all." See § 6693 as to application of act to violation "committed before its passage." § 6694 applies to bridge building. In *Anderson v. Shawnee Compress Co.*, 17 Okla. 231; 87 Pac. 315; 15 L. R. A. N. S. 846 (1906), an agreement was held invalid as tending to restriction upon competition in the compression of cotton throughout the cotton-producing States.

As to former act, see *Territory v. Long Bell Lumber Co.*, 99 Pac. 911 (Supm. Ct. Okla., 1908). Here a statute allowing an injunction "in the name of the Territory to enjoin and suppress the keeping and maintaining of a common nuisance" was applied in allowing relief against a monopoly of the supply of lumber, fuel and grain.

By Const., art. 2, § 32, "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." For similar provisions, see under Ark. (§ 205); Md. (§ 216); N. C. (§ 225); Tenn. (§ 231); Tex. (§ 232); Wyom. (§ 236).

of mining, or any article or thing whatsoever, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado or any other kind of policy issued by any corporation, partnership, individual or association of persons aforesaid), shall be deemed and adjudged guilty of a conspiracy to defraud, and to be subject to the penalties as provided by this act.”⁴⁴ “A ‘monopoly’ is any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, custom, skill or acts, or of any other valuable thing or possession by or between persons, firms or corporations, or associations of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a ‘monopoly’ as thus defined and contemplated includes not merely such combinations by and between two or more persons, firms or corporations acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations or incorporations of capital, skill, credit, assets, property, custom, trade or other valuable thing or possession, whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation or an incorporated body

⁴⁴ L. 1902, c. 574, § 1. For similar provisions, see under Ala. (§ 204); Ark. (§ 205); Cal. (§ 206); Ill. (§ 209); Iowa (§ 211); Ky. (§ 213); Minn. (§ 218); Miss. (§ 219); Mo. (§ 220); N. D. (§ 226);

Utah (§ 233). This act is substantially identical with the Texas act of 1899, now repealed. For decisions thereunder, see under Tex. (§ 232).

resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition or control of shares or certificates of stock or bonds or other corporate property or franchises and all corporations or partnerships that have been or may be created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, properties, custom, trade or corporate or firm belongings of two or more firms or corporations or companies, are especially declared to constitute monopolies within the meaning of this act, if so created or entered into for any one or more of the purposes named in this act; and a 'monopoly,' as defined in this section, is hereby declared to be unlawful and against public policy, and any and all persons, firms, corporations or associations of persons engaged therein shall be deemed and adjudged guilty of a conspiracy to defraud and shall be subject to the penalties prescribed in this act." ⁴⁵

⁴⁵ Id., § 2. This seems substantially identical with Ark. L. 1905, c. 1, § 5. See also under Ga. (§ 207); Miss. (§ 219). In *State v. Virginia-Carolina Chemical Co.*, 71 S. C. 544, 559; 51 S. E. 455, 460 (1905), relief was granted under the former act of 1897 (Civil Code, 1902, §§ 2847-5; Crim. Code, 1902, §§ 212-6; here held constitutional as a police measure), against 'certain transactions by which a foreign corporation with a very large capital had transferred to it certain domestic corporations independently engaged in the manufacture and sale of fertilizers in the State, and had acquired all other corporations engaged in the manufacture of fertilizers except four of small output; had acquired a very large proportion of the land phosphate territory in the State; controlled the majority of the stock of a corporation extensively engaged in the manufacture of a fertilizer ingredient;

owned and controlled a majority of the corporations engaged in the manufacture of fertilizers in several neighboring States; had secured itself against competition from outside the State in its control of fertilizers therein; had entered into agreements with some of such other corporations, by which the latter were not to engage in the manufacture and sale of fertilizers within the State. The prohibition of the act against contracts, etc., to lessen competition in *importation* was held in contravention of the commerce clause of the Federal constitution, but not to affect the validity of other portions of the act. As to limitation of prohibition of act to unreasonable restrictions, see § 179. In *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.*, 75 S. C. 378; 55 S. E. 973; 9 L. R. A. N. S. 501 (1905), *State v. Virginia-Carolina Chemical Co.* was reaffirmed as holding

§ 230. **South Dakota.**—"A trust or a monopoly is a combination of capital or skill, by two or more persons, firms, corporations, or associations of persons; first, to create or carry out restrictions in trade; second, to limit the production or to in-

that the act of 1897 must be construed as intending that the contracts, etc., therein mentioned were unlawful and against public policy only when made with a view to lessen or which tend to lessen full and free competition to an unreasonable extent. It was here held inapplicable to a contract of sale containing a provision that the seller sell exclusively to the buyer, and the buyer buy exclusively of the seller. See also, as to act of 1897, *Packard v. Byrd*, 73 S. C. 1; 51 S. E. 678; 6 L. R. A. N. S. 547 (1905).

The provisions of §§ 3, 5, below, which may be based on a misapprehension of the fundamental distinction between a combination to produce a private injury and a combination to produce a public injury seem directed against acts designed to injure a trade competitor, rather than against "trusts" or "monopolies" as ordinarily understood. As to boycott, see also under Ind. (§ 210); Mo. (§ 220); Ohio (§ 227).

"If any person, persons, company, partnership, association or corporation engaged in the manufacture or sale of any article of commerce or consumption from the raw material produced or mined in this State, shall *with the intent or purpose of driving out competition or for the purpose of financially injuring competitors*, sell at less than the cost of manufacture, or give away their manufactured products for the purpose of driving out competition or

financially injuring competitors engaged in the manufacture and refining of raw material in this State, said person, persons, company, partnership, association or corporation resorting to this method of securing a monopoly in the manufacture, refining and sale of the finished product produced or mined in this State, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade and on conviction shall be subject to the penalties of this act." § 3. To like effect Ark. L. 1905, c. 1, § 6.

By § 4 the penalty for a violation of the act is a forfeiture of not less than \$200 or more than \$5,000, each day of continuance of violation to be a separate offense.

By § 5 it is a conspiracy within the penalties of the act "if any two or more persons or corporations who are engaged in buying or selling any article of commerce, manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, *for the reason that such other person or corporation is not a member of or a party to such pool, trust, agreement, combination, confederation, association or under-*

crease or reduce the price of commodities; third, to prevent competition in the manufacture, transportation, sale or purchase of merchandise, produce or commodities; fourth, to fix any standard or figure whereby the price to the public shall be in any manner established or controlled.”⁴⁶ “It shall be unlawful for any incorporated company, copartnership or association of persons in this State, directly or otherwise, to fix prices, limit the production or regulate the transportation of any product or commodity so as to obstruct or delay or prevent competition in such production or transportation.”⁴⁷ “It shall be unlawful for any incorporated company, copartnership or association of persons in any other State to directly or otherwise combine or make any contract with any incorporated company, copartnership or association of persons in this State to fix prices, limit the production of commodities or regulate the transportation, directly or otherwise, of any product or commodity so as to obstruct or prevent competition.”⁴⁸

§ 231. **Tennessee.**—“All arrangements, contracts, agree-

standing; or shall boycott or threaten any person or corporation for buying from or selling to any other person or corporation who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding, any such article or thing aforesaid.”

By § 6 provision is made for the forfeiture of the rights of a domestic or foreign corporation violating the act. In a proceeding against a foreign corporation “proof that any person who has been acting as agent of such foreign corporation in transacting its business in this State, has been while acting as such agent, and in the name, behalf or interest of such foreign corporation violating any provisions of the preceding sections of this act shall be received as *prima facie* proof of the act of the

corporation itself.” As to duty of prosecuting officers, see § 7.

For provision enabling the attorney-general to secure testimony in relation to the violation of acts prohibiting trusts and combinations and violations of law by corporations, see L. 1902, c. 575.

“The general assembly shall enact laws to prevent all trusts, combinations, contracts and agreements against the public welfare.” Const., art. 9, § 13.

For prohibition against combination affecting rates for fire insurance, see Civil Code (1902), §§ 1819, 1820; Crim. Code (1902) 217.

⁴⁶ Penal Code, § 770. For similar provisions, see under Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Neb. (§ 222); N. D. (§ 226); Ohio (§ 227).

⁴⁷ Id., § 771.

⁴⁸ Id., § 772.

ments, trusts or combinations between persons or corporations made with a view to lessen, or which tend to lessen full and free competition in the importation or sale of articles imported into this State, or in the manufacture or sale of articles of

By § 773 the penalty for a violation of the preceding provisions is a fine of not less than \$1,000 or more than \$5,000, and upon conviction for a second offense, of not less than \$5,000 or more than \$10,000.

"Any combination, agreement or trust made, entered into or formed between persons, copartnerships, or corporations in this State, or by and between any persons, copartnerships or corporations within this State with any person, copartnerships or corporations without this State, with intent and which shall in any manner tend to prevent a free, fair and full competition in the production, manufacture or sale of any article or commodity of domestic growth, use or manufacture, or that tends to advance the price to the user or customer of any article or commodity of domestic growth, use, production or manufacture beyond the reasonable cost of production or manufacture thereof, or that tends to advance the price to the user, purchaser or consumer of farm machinery, implements, tools, supplies and lumber, wood and coal, imported into this State from any other State, Territory or country, beyond the reasonable cost of production and sale or manufacture and sale of the same, or which tends to and does induce and accomplish a sale of wheat, corn, oats, barley, flax, cattle, sheep, hogs or other farm or agricultural products for less than such farm or agricultural

products are really worth at the time of sale, or for a less price than such farm or agricultural products would sell for in open market if such contraction, agreement or trust did not exist," is declared to be "against public policy and unlawful and void." § 776. For similar provisions, see under Ind. (§ 210); Kan. (§ 212); Mo. (§ 220); N. D. (§ 226); Tenn. (§ 231). There are also here special provisions as to such combinations affecting the rate of interest. The penalty is a fine not exceeding \$1,000, or imprisonment not exceeding three years or both.

By § 777 the prohibition of § 776 is declared to apply to one selling as agent of a non-resident manufacturer or wholesale dealer, while such manufacturer or dealer refuses to sell at wholesale or manufacturers' prices to "responsible and reputable wholesale or retail dealers in this State." And by § 778 provision is made for injunctions against violations of the preceding provisions. As to duty of prosecuting officers, see § 779.

By § 780 an action may be maintained for damage suffered "by reason of the operation of any pool, trust or combination," so for the recovery back of property contributed to or invested in an industry becoming the property of or controlled by such pool, etc. For similar provisions, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Mo. (§ 220); Neb. (§ 222); N. M. (§ 223); Ohio

domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend to advance, reduce or control the price or the cost to the producer or the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void.”⁴⁹

(§ 227); Okla. (§ 228); Tenn. (§ 231); Utah (§ 233); Wis. (§ 235).

By § 781 the applicants for a corporate charter are required to make oath that it is not formed to enable avoidance of the preceding provision.

Const., art. 17, § 20, seems substantially identical with Wash. Const., art. 12, § 22, with, however, the following words added: “So as to prevent competition in such prices, production or transportation or to establish excessive prices therefor.” See also under Wyom. (§ 236). It is also here provided that “the legislature shall pass laws for the enforcement of this section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose may, as a penalty, declare a forfeiture of their franchises.”

L. 1903, c. 158, relates to restriction upon competition in fire, etc., insurance business. In *Hartford Fire Ins. Co. v. Perkins*, 125 Fed. 502 (C. C. S. D., 1903), the court declined to pass on the question of the constitutionality of such act.

⁴⁹ L. 1903, c. 140, § 1. For similar provisions, see under Kan. (§ 212); Mo. (§ 220); S. D. (§ 230). This act was sustained in *State v. Witherspoon*, 115 Tenn. 138; 90 S. W. 852 (1905; see as to sufficiency of indictment thereunder). So in *Standard Oil Co. v. State*,

117 Tenn. 618, 638; 100 S. W. 705, 709; 10 L. R. A. N. S. 1015, 1020 (1906), as not in conflict with the commerce clause of the Federal constitution; see (117 Tenn. 646; 100 S. W. 711; 10 L. R. A. N. S. 1022) as to application of State statute to articles that have been imported into State. This was followed in *State ex rel. v. Standard Oil Co.*, 110 S. W. 565, 580 (Supm. Ct. Tenn., 1908), in holding the act inapplicable to a transaction covered by the commerce clause.

In *Standard Oil Co. v. State*, supra, § 1 was applied (117 Tenn. 654; 10 S. W. 714; 10 L. R. A. N. S. 1025) to methods of the Standard Oil Company employed to protect oil that had been imported into the State, from competition with that about to be imported and offered for sale by a competitor; in *State ex rel. v. Standard Oil Co.*, supra, to arrangement by which purchasers from a competitor were induced to cancel their orders.

By § 2 provision is made for the forfeiture of the charter of a domestic corporation violating any of the provisions of the act and a foreign corporation violating such provisions is prohibited from doing business in the State. In *State ex rel. v. Standard Oil Co.*, supra, § 2 was sustained and applied against the objection that the transaction involved was a crime and should have been redressed by a criminal action. Here was allowed an in-

§ 232. **Texas.**—"A trust is a combination of capital, skill

junction against a foreign corporation doing business in the State. See as to whether it is competent to provide civil remedy against corporations while providing criminal remedy against natural persons; also as to period of limitations applicable.

As to respective liability of corporations and their officers or agents for criminal conspiracy, see *Standard Oil Co. v. State*, supra (117 Tenn. 662; 100 S. W. 716; 10 L. R. A. N. S. 1027).

By § 3 such violation of the provisions of the act is "declared to be destructive of full and free competition and a conspiracy against trade." The penalty is a fine of not less than \$100 or more than \$5,000 or imprisonment for not less than one year or more than ten years or both such fine and imprisonment. This was held inapplicable to corporations, in *Standard Oil Co. v. State*, supra (117 Tenn. 648; 100 S. W. 712; 10 L. R. A. N. S. 1023); see also (117 Tenn. 667; 100 S. W. 767; 10 L. R. A. N. S. 1028), as to respective liability of corporations and their officers or agents for criminal conspiracy.

By § 4 one damaged by such arrangement, etc., described in § 1 may recover from those operating it the full consideration paid for any goods the sale of which is controlled by such trust or combination. See also, under Ind. (§ 210); Kan. (§ 212); S. D. (§ 230).

The constitutionality of the former act of 1897 (c. 94) was sustained against various objections in *State ex rel. v. Schlitz Brewing Co.*, 104 Tenn. 715; 59 S. W. 1033;

78 Am. St. Rep. 941 (1900). Here was held maintainable thereunder a proceeding for the forfeiture of the right of a foreign corporation to do business. The exception in such act of "agricultural products or live stock while in the possession of the producer or raiser" from the operation thereof, was here held not to contravene constitutional prohibitions against class legislation, but see § 181; also under Ga. (§ 207); Ill. (§ 209); Ind. (§ 210); La. (§ 214); Mich. (§ 217); Mont. (§ 221); N. C. (§ 225); N. D. (§ 226); Tex. (§ 232). As to criminal liability under act of 1897, see *Post v. Railroad*, 103 Tenn. 184, 230; 52 S. W. 301, 312; 55 L. R. A. 481, 493 (1899). See also the former provisions of Code (1896), §§ 3185-91, held in *American Handle Co. v. Standard Handle Co.*, 59 S. W. 709, 718 (Tenn. Ch. App., 1900), to apply to an agreement between two manufacturing corporations by which, though "each was to run its own plant, and pay its own expenses up to the point of production," yet "they were to unite in all sales of products and to sell all of the products of each mill at precisely the same price." So held, though such agreement "had no appreciable effect upon the general market in raising or lowering prices, because the product of the two mills was too small, compared with the whole output of all the mills of the world to bring about such result, being only 10 per cent. of the whole." See also Code (1896), §§ 6622-5.

For an instance of a restriction held illegal under §§ 3185-91, 6622-5 as well as at common law, see *Bailey v. Master Plumbers*, 103

or acts⁵⁰ by two or more persons, firms, corporations or association of persons, or either two or more of them, for either, any or all of the following purposes: (1) To create or which

Tenn. 99; 52 S. W. 853; 46 L. R. A. 561 (1899; see § 120).

"Perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed." Const., art. 1, § 22. For similar provisions, see under Ark. (§ 205); Md. (§ 216); N. C. (§ 225); Okla. (§ 228); S. D. (§ 230); Tex. (§ 232); Wash. (§ 234); Wyom. (§ 236).

For prohibition against monopoly in business of compression of cotton in bales, see Code (1896), § 3077; of agreement to maintain rates for insurance on property, L. 1905, c. 479.

⁵⁰ Thus far the act is identical with that of 1889 (see *infra*). To the presence therein, as herein, of the word "combination" was attached much significance. As to the prohibition against combinations, see *Anheuser-Busch Brewing Assoc. v. Houck*, 27 S. W. 692 (Tex. Civ. App., 1894); affirmed as *Houck v. Anheuser-Busch Brewing Assoc.*, 88 Tex. 184; 30 S. W. 869 (1895); *Texas & Pacific Coal Co. v. Lawson*, 89 Tex. 394; 34 S. W. 919 (1896); reversing 10 Civ. App. 491; 31 S. W. 843 (1895); *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298; 38 S. W. 29, 750; 35 L. R. A. 241 (1897); *Texas Brewing Co. v. Templeman*, 90 Tex. 277; 38 S. W. 27 (1896); *Texas Brewing Co. v. Meyer*, 38 S. W. 263 (Tex. Civ. App., 1896); *Gates v. Hooper*, 90 Tex. 563; 39 S. W. 1079 (1897); reversing *Id.* 186 (Tex. Civ. App., 1897); *Texas Brewing Co. v. Anderson*, 40 S. W. 737 (Tex. Civ. App., 1897); *Van-*

deweghe v. American Brewing Co., 61 S. W. 526 (Tex. Civ. App., 1901). The word *combination*, as here used, was held to mean "union" or "association." *Texas & Pacific Coal v. Lawson*, *supra*; *Gates v. Hooper*, *supra*. In *Gates v. Hooper*, where it was held not to cover the case of an agreement by the seller of a business to retire from that line of business, the court said: "If there be no union or association by two or more of their 'capital, skill or acts,' there can be no 'combination,' and hence no 'trust.' When we consider the purposes for which the 'combination' must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts,' denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." So the word *combination*, as thus used, was held not to cover the case of a mere agreement between principal and agent, in *Welch v. Phelps & Bigelow Windmill Co.*, 89 Tex. 653; 36 S. W. 71 (1896); *Gates v. Hooper*, *supra*, where the agreement of the seller to exert himself to aid the buyer in securing patronage, was held to merely constitute the former the agent of the latter for that purpose.

may tend to create or carry out restrictions in trade or commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.⁵¹ (2) To fix, maintain, increase or

⁵¹ The corresponding language in the act of 1889 was: "To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State." Under the prohibition against combinations "to create or carry out *restrictions in trade*," it would seem that combinations were held illegal, that would not, necessarily at least, have been so held under the mere prohibition against restrictions upon competition. Thus, in *Texas & Pacific Coal Co. v. Lawson*, 89 Tex. 394; 34 S. W. 919 (1896); reversing 10 Civ. App. 491; 31 S. W. 843 (1895), and holding void a lease of a saloon by a coal company, it to receive a share of the profits, and agreeing not to permit any other saloon to do business on its lands during the term of the lease; that it would pay its employees in checks instead of money, and redeem weekly such of the checks as the lessee might take in for liquors sold. It was intimated, however, that the restriction upon competition thus created would have been illegal on common-law grounds. See previous decision in 32 S. W. 871 (1895). So in *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298; 38 S. W. 29, 750; 35 L. R. A. 241 (1897), of an agreement for the sale of beer by a brewing company, it being provided that, during the performance of the contract, the company

would not sell or consign any beer of its manufacture to any other party at Amarillo, Texas, and that the buyer would neither sell nor be interested in the sale of any beer not manufactured by the company; the company to erect a cold-storage house and allow the buyer the free use of the same. To similar effect: *Texas Brewing Co. v. Templeman*, 90 Tex. 277; 38 S. W. 27 (1896); *Texas Brewing Co. v. Meyer*, 38 S. W. 263 (Tex. Civ. App., 1896); *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120; 47 S. W. 288 (1898); *Simmons v. Terry*, 79 S. W. 1103 (Tex. Civ. App., 1904). And see *Texas Brewing Co. v. Anderson*, 40 S. W. 737 (Tex. Civ. App., 1897); *Texas Brewing Co. v. Durrum*, 46 S. W. 880 (Tex. Civ. App., 1898); *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232; 54 S. W. 804 (1899); *Wiggins v. Bisso*, 92 Tex. 219; 47 S. W. 637; 71 Am. St. Rep. 837 (1898). And so in *Gates v. Hooper*, 39 S. W. 186 (Tex. Civ. App., 1897), of an ordinary vendor's agreement to retire from business. The decision last cited was, however, reversed in 90 Tex. 563; 39 S. W. 1079 (1897), on the ground that there was no "combination" within the meaning of the statute. To the same effect, *Erwin v. Hayden*, 43 S. W. 610 (Tex. Civ. App., 1897); *Patterson v. Crabb*, 51 S. W. 870 (Tex. Civ. App., 1899); *Tobler v. Austin*, 22 Tex. Civ. App. 99; 53 S. W. 706 (1899); *Wolff v. Hirschfeld*, 23

reduce the price of merchandise, produce or commodities or the cost of insurance or of the preparation of any product for mar-

Tex. Civ. App. 670; 57 S. W. 572 (1900); *Crump v. Ligon*, 84 S. W. 250 (Tex. Civ. App., 1904). See *Comer v. Burton-Lingo Co.*, 24 Tex. Civ. App. 251, 58 S. W. 969 (1900); *Forrest Photographic Co. v. Hutchinson Grocery Co.*, 108 S. W. 768 (Tex. Civ. App., 1908). As to Federal act, see § 192. See also as to agreement of vendor, under Neb. (§ 222).

In *State v. Shippers' Compress & Warehouse Co.*, 95 Tex. 603; 69 S. W. 58 (1902), it seems to have been assumed that the prohibition against a combination "to create or carry out restrictions in aids to commerce" was applicable to the organization of a corporation for that purpose. It was, however, held not applicable to the corporation under consideration, the purpose as declared in the charter being as authorized by statute, and the acquisition by the corporation of certain property at the time of the incorporation having no effect to produce any restriction upon competition. In *State v. Missouri, K. & T. Ry. Co. of Texas*, 99 Tex. 516; 91 S. W. 214; 5 L. R. A. N. S. 783 (1906), the prohibition against a combination "to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State" was held to apply to an agreement by a railroad corporation to furnish exclusive facilities to an express company. But in *Fort Worth & Denver City Ry. Co. v. State*, 99 Tex. 34; 87 S. W. 336; 70 L. R. A. 950 (1905), it was held not to apply to a contract between a railroad corporation and a sleeping car

company, by which the latter had the exclusive right to furnish sleeping cars for use on the lines of the former. See subsequent decision in 88 S. W. 370 (Tex. Civ. App., 1905). So in *Lewis v. Weatherford, etc., Ry. Co.*, 36 Tex. Civ. App. 48; 81 S. W. 111 (1904), held not to apply to the grant of the exclusive privilege of soliciting the transfer business of passengers on railroad trains. So in *Redland Fruit Co. v. Sargent*, 113 S. W. 330 (Tex. Civ. App., 1908), of a grant of the exclusive right of sale of merchandise on certain premises, with an agreement to induce one's employees to trade with the grantee.

As in case of the Federal act, reasonable as well as unreasonable restrictions were held to be included within the prohibition of the act of 1889. *Texas & Pacific Coal Co. v. Lawson*, 89 Tex. 394; 34 S. W. 919 (1896); reversing 10 Civ. App. 491; 31 S. W. 843 (1895). See also *Gates v. Hooper*, 39 S. W. 186 (Tex. Civ. App., 1897); reversed in 90 Tex. 563; 39 S. W. 1079 (1897). But in *Re Grice*, 79 Fed. 627, 643 (C. C. Tex., 1897), the prohibition of the act was held violative of the Fourteenth Amendment in that it included reasonable as well as unreasonable restrictions.

The word "trade" as used herein was held to be synonymous with "traffic," and not to include the business of insurance. *Queen Ins. Co. v. State*, 86 Tex. 250, 264; 24 S. W. 397, 401; 22 L. R. A. 483, 491 (1893; the contract of insurance being declared not to be an "article of commerce" or a "commodity" under the act); but to

ket or transportation.⁵² (3) To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce or in the preparation of any product for market or transportation. (4) To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce or the cost of transportation or insurance or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established. (5) To make, enter into, maintain, execute or carry out any contract, obligation or agreement, by which the parties thereto bind, or have bound themselves, not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance or the cost of the preparation of any product for market or transportation between them, or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or business of transportation or insurance, or the preparation of any product for market or transportation, by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance,

include dealing in liquors. *Texas & Pacific Coal Co. v. Lawson*, *infra*.

In *Texas & Pacific Coal Co. v. Lawson*, 89 Tex. 394, 400; 34 S. W. 919, 920 (1896); reversing 10 Civ. App. 491; 31 S. W. 843 (1895), the broad language of the act was declared to ignore the dis-

inction between articles of, and articles not of, necessity.

⁵² As to effect of prohibition in act of 1889 against combination to *reduce* price, see *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118; 54 S. W. 289 (1899).

or charge for the preparation of any product for market or transportation, whereby its price or such charge might be in any manner affected. (6) To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation. (7) To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof.”⁵³ “A monopoly is a combination or consolidation of

⁵³ L. 1903, c. 94, § 1. For similar provisions, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Neb. (§ 222); N. D. (§ 226); Ohio (§ 227). The act as well as that of 1899 was sustained as valid in *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; 29 Supm. 220 (1909); affirming 106 S. W. 918 (Tex. Civ. App., 1907), against various objections, thus, that it was retroactive, the case being, however, one of continuance after the passage of the act, of an arrangement previously made. See also, as to such objection, *State v. Missouri, K. & T. Ry. Co. of Texas*, 99 Tex. 516; 91 S. W. 214; 5 L. R. A. N. S. 783 (1906). In *Crump v. Ligon*, 84 S. W. 250 (Tex. Civ. App., 1904), however, the act of 1903 was held not to apply retroactively to a contract. In *Waters-Pierce Oil Co. v. Texas*, supra, was also overruled the objection that the acts were invalid as “vague, indefinite and uncertain,” such objection being found in the prohibition of the act of 1899 against contracts, etc., “reasonably calculated” to fix and regulate prices; so that of the act of 1903 against acts that “tend” to accomplish the prohibited results; so

of the objection that the fines imposed were excessive, the prohibition of the Eighth Amendment being held inapplicable. In *Re Grice*, 79 Fed. 627, 638 (C. C. Tex., 1897), the provision of the act of 1899, by which it was attempted to claim jurisdiction for offenses committed outside the State, was held inoperative and void. In *Waters-Pierce Oil Co. v. Texas*, supra, the acts of 1899 and 1903 were applied to restrictions upon competition in sales, though by way of performance of agreement entered into outside the State.

In *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298; 38 S. W. 29, 750; 35 L. R. A. 241 (1897), recovery was not allowed for beer sold by a brewing company transacting business in another State, and shipping the beer from that State under a contract providing that, during the performance of the contract, the company would not sell or consign any beer of its manufacture to any other party at Amarillo, Texas (where the buyer transacted business), and that the buyer would neither sell nor be interested in the sale of any beer not manufactured by the company, the company to erect a cold-

two or more corporations when effected in either of the following methods: (1) When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in § 1. (2) Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.”⁵⁴ “Either or any of the following acts shall constitute a

storage house, and allow the buyer the free use of the same. The transaction was held within the act of 1889, notwithstanding the commerce clause of the Federal constitution; this on the ground that the contract dealt with the beer after it had ceased to be an article of interstate commerce. The court said: “A portion of the stipulations of the contract being lawful, and the others unlawful, the taint of illegality affects and destroys the whole. The commerce clause of the constitution was not designed to protect the contractual rights of a person who thus voluntarily intermingles an otherwise legal interstate commerce transaction with an entirely local and unlawful one.” But it was also held that exemption from the operation of the State statute was prevented by the Wilson Act of Congress of August 8, 1890. See, also, *Anheuser-Busch Brewing Assoc. v. Houck*, 27 S. W. 692 (Tex. Civ. App., 1894); affirmed as *Houck v. Anheuser-Busch Brewing Assoc.*, 88 Tex. 184; 30 S. W. 869 (1895). So the State

statute was held applicable in *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1; 44 S. W. 936 (1898), where the right of a foreign corporation to do business in the State was declared forfeited, it appearing that it not only shipped its products into the State, but entered into agreements with dealers in the State for exclusive dealing, by which the latter were to buy and sell the products of such corporation exclusively, and not to sell the products so bought to any one dealing with a dealer in competitive oils.

In *White Dental Manuf. Co. v. Hertzberg*, 51 S. W. 355 (Tex. Civ. App., 1899), following *Fuqua v. Pabst Brewing Co.*, supra, the act was applied to an agreement for the exclusive right to sell goods manufactured by another, including an agreement to sell no other goods. The court said: “The sale and delivery may have been an interstate transaction, but after the interstate portion of the transaction had ended, then the trust part of the contract arose.”

⁵⁴ *Id.*, § 2. For a similar provi-

conspiracy in restraint of trade: (1) Where any two or more persons, firms, corporations or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other persons, firm, corporation or association of persons any article of merchandise, produce or commodity.⁵⁵ (2) Where any two or more persons, firms, corporations or associations of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.”⁵⁶

sion, see under Ala. (§ 204). Compare under Ga. (§ 207); Miss. (§ 219); N. Y. (§ 224); Okla. (§ 228); Tex. (§ 232). In *Fort Worth & Denver City Ry. Co. v. State*, 99 Tex. 34; 87 S. W. 336; 70 L. R. A. 950 (1905), this was held not to apply to the contract there under consideration. See note 51, *supra*. As to whether it applies to a corporation the stock or property of which is acquired, see *Waters-Pierce Oil Co. v. State*, 106 S. W. 918 (Tex. Civ. App., 1907).

⁵⁵ Id., § 3 (subd. 1). In *Gust Feist Co. v. Albertype Co.*, 100 S. W. 1139 (Tex. Civ. App., 1908), this was held to apply to a provision in a contract of sale giving the buyer an exclusive right of sale. But in *Forrest Photographic Co. v. Hutchinson Grocery Co.*, 108 S. W. 768 (Tex. Civ. App., 1908), not to a contract for service as distinguished from “the sale of an article of merchandise, produce or commodity.” In *Norton v. Thomas*, 99 Tex. 578; 91 S. W. 780 (1906); 93 S. W. 711 (Tex. Civ. App., 1906), a like provision of the act of 1899 was held not to apply to an agreement

by a seller not to sell goods of the same kind in the locality where the buyer himself transacted business.

⁵⁶ Id., § 3 (subd. 2). See also, as to boycotts, under Ind. (§ 210); Ohio (§ 227).

“Any and all trusts, monopolies and conspiracies in restraint of trade as herein defined, are hereby prohibited and declared to be illegal.” § 4.

In *Lytle v. Galveston, H. & S. A. Ry. Co.*, 100 Tex. 292; 99 S. W. 396; 10 L. R. A. N. S. 437 (1907), the issue of non-transferable railroad excursion tickets at a reduced rate for a return passage, was held not within the “anti-trust laws” either of the State or of the United States.

By § 5 (see also § 7) provision is made for the forfeiture of the charter and franchise of a domestic corporation violating any of the provisions of the act. As to proceedings by attorney-general in case of violation by corporation, see § 6. In *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118; 54 S. W. 289 (1899), was decreed in a quo warranto proceeding the forfeiture

§ 233. **Utah.**—"Any combination by persons having for its

of the charter of a corporation, party to a combination illegal under the act of 1889. A receiver was here appointed without the application of anyone interested in the property, *Havemeyer v. Superior Court*, 84 Cal. 327; 24 Pac. 121; 10 L. R. A. 627; 18 Am. St. Rep. 192 (1890), being distinguished as decided under different statutory provisions. As to allowing relief to stockholder by injunction against violation of act by corporation, see *Lone Star Salt Co. v. Blount*, 107 S. W. 1163 (Tex. Civ. App., 1908).

By § 8 (see also § 10) a foreign corporation violating any of the provisions of the act is prohibited from doing business within the State. This was given effect in *Waters-Pierce Oil Co. v. State*, note 53, *supra*.

Under the act of 1889, the right of a foreign corporation to transact business in the State was declared forfeited in *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1; 44 S. W. 936 (1898); affirmed in 177 U. S. 28; 20 Supm. 518; 44 L. Ed. 657 (1900); *National Cotton Oil Co. v. State*, 72 S. W. 615 (Tex. Civ. App., 1903). As to appointment of receiver of foreign corporation under the act of 1907, see *Waters-Pierce Oil Co. v. State*, 103 S. W. 836 (Tex. Civ. App., 1907). By § 9, R. S. (1895), c. 92 applies to proceedings to forfeit charter. By § 11 the penalty is forfeiture of \$50 for each day of violation. This was given effect in *Waters-Pierce Oil Co. v. State*, *supra*. By § 13 (as amended by L. 1907, c. 97), in addition provision is made for imprisonment for not less than two or more than ten years. See

also § 19, added by L. 1907, c. 10 (called session); see, also, c. 173 (regular session). A proceeding to recover penalties under the act of 1899 was held a civil, and not a criminal, case, for the purpose of appeal, in *State v. Waters-Pierce Oil Co.*, 67 S. W. 1057 (Tex. Civ. App., 1902). In *State v. Laredo Ice Co.*, 96 Tex. 461; 73 S. W. 951 (1903), the act was held unconstitutional as prescribing an excessive fine. As to period of limitation applicable for purpose of enforcement of act, see *Waters-Pierce Oil Co. v. State*, 106 S. W. 918 (Tex. Civ. App., 1907).

"Any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity."

§ 12. For application of a substantially identical provision of the act of 1889, see *Texas & Pacific Coal Co. v. Lawson*, 89 Tex. 394; 34 S. W. 919 (1896); reversing 10 Civ. App. 491; 31 S. W. 843 (1895); *Fuqua v. Pabst Brewing Co.*, 90 Tex. 298; 38 S. W. 29, 750; 35 L. R. A. 241 (1897); *Texas Brewing Co. v. Templeman*, 90 Tex. 277; 38 S. W. 27 (1896); *Pasteur Vaccine Co. v. Burkey*, 22 Tex. Civ. App. 232; 54 S. W. 804 (1899); *Mansur & Tebbetts Implement Co. v. Price*, 22 Tex. Civ. App. 616; 55 S. W. 764 (1900). See under the act of 1899, *Troy Buggy Works Co. v. Fife*, 74 S. W. 956 (Tex. Civ. App., 1903). In *Anheuser-Busch Brewing Assoc. v. Houck*, 27 S. W. 692 (Tex. Civ. App., 1894); affirmed as *Houck v. Anheuser-Busch Brewing Assoc.*, 88 Tex. 184; 30 S. W. 869 (1895), the illegality of an agreement, under the act of

object or effect the controlling of the prices of any professional

1889, was held to justify a refusal to carry out an agreement to sell to such parties, but not to prevent recovery for goods sold, though with knowledge that they were to be used for the purposes of such combination. This on the ground that the buyer could claim no benefits under the contract, though it might be valid as to the seller. As to what is evidence that act is act of corporation, see § 14. As to attendance and examination of witnesses, see § 15 (as amended by L. 1907, c. 120). By L. 1907, c. 12, provision is made at length for taking of evidence.

"Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed." Const., art. 1, § 26. For similar provisions, see under Ark. (§ 205); Md. (§ 216); N. C. (§ 225); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231); Wash. (§ 234); Wyom. (§ 236).

By L. 1907, c. 10 (called session; see c. 173 of regular session), were added § 20 as to venue, § 21 as to duties of prosecuting officers, and § 22 as to fees. See under act of 1899, *State v. Brady*, 114 S. W. 895 (Tex. Civ. App., 1909).

A former act was L. 1899, c. 146, most of which was substantially identical with corresponding provisions of S. C. L. 1902, c. 574 (see § 229). It was held constitutional in *State v. Laredo Ice Co.*, 96 Tex. 461; 73 S. W. 951 (1903); *Waters-Pierce Oil Co. v. State*, 106 S. W. 918 (Tex. Civ. App., 1907). See 36 Am. Law Rev. 790 (1902). So in *National Cotton Oil Co. v. Texas*, 197 U. S. 115; 25 Supm. 379; 49 L. Ed. 689 (1905), it was

sustained against the objection that it violated the 14th amendment. Here was followed *Smiley v. Kansas*, 196 U. S. 447; 25 Supm. 276; 49 L. Ed. 546 (1905; see § 212), as involving a Kansas statute "identical in effect and even in words, in all that concerns the present controversy, with the Texas statutes." As to preservation by act of 1903 of right to enforce act of 1899, see *Waters-Pierce Oil Co. v. State*, 106 S. W. 918 (Tex. Civ. App., 1907). See also, as to objection to act on ground of imposition of excessive fines, etc. In *Troy Buggy Works Co. v. Fife*, 74 S. W. 956 (Tex. Civ. App., 1903), its prohibitions were held to apply to an agreement for exclusive dealing; that is, to an agreement by a seller not to sell to any other purchaser. In *Mason v. Adoue*, 30 Tex. Civ. App. 276; 70 S. W. 347 (1902), an action thereunder for recovery back was held to be for a penalty and not for unliquidated damages, so that the cause of action died with the offending corporation.

A still earlier act was that of L. 1889, c. 117, amended by L. 1895, c. 83; see R. S. (1895), arts. 5313-21a; Penal Code, §§ 976-988d; L. 1899, c. 172. It was wonderfully prolific in litigation. Much of it, though repealed by the act of 1899, has been substantially re-enacted in the present act. In *Queen Ins. Co. v. State*, 22 S. W. 1048 (Tex. Civ. App., 1893), it had been held inoperative for failure to declare trusts illegal; but this decision was reversed in 86 Tex. 250, 268; 24 S. W. 397, 403; 22 L. R. A. 483, 493 (1893).

In view of *Connolly v. Union*

services, any products of the soil, any article of manufacture or

Sewer Pipe Co., 184 U. S. 540; 22 Supm. 431; 46 L. Ed. 679 (1902), the act of 1889 was clearly unconstitutional because of the presence of the provision therein that it should "not apply to agricultural products or live stock while in the hands of the producer or raiser." It was indeed so held in *Re Grice*, 79 Fed. 627, 645 (C. C. Tex., 1897). The following decisions, in so far as to the contrary, must be regarded as overruled: *Anheuser-Busch Brewing Assoc. v. Houck*, 27 S. W. 692 (Tex. Civ. App., 1894), affirmed as *Houck v. Anheuser-Busch Brewing Assoc.*, 88 Tex. 184; 30 S. W. 869 (1895); *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1; 44 S. W. 936 (1898); *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118; 54 S. W. 289 (1899); *Crystal Ice & Manuf. Co. v. State*, 23 Tex. Civ. App. 293; 56 S. W. 562 (1900). See *Hathaway v. State*, 36 Tex. Crim. App. 261, 277; 36 S. W. 465, 471 (1896). See § 181; also under Ga. (§ 207); Ill. (§ 209); Ind. (§ 210); La. (§ 214); Mich. (§ 217); Mont. (§ 221); N. C. (§ 225); N. D. (§ 226); Tenn. (§ 231). But such provision of the act of 1889 was in *State v. Laredo Ice Co.*, 96 Tex. 461; 73 S. W. 951 (1903), held not incorporated into the act of 1899 so as to affect its constitutionality. In *State v. Shippers' Compress & Warehouse Co.*, 95 Tex. 603; 69 S. W. 58 (1902), the act of 1899, though held void on the ground stated in *Connolly v. Union Sewer Pipe Co.*, was nevertheless held valid to the extent that it authorizes the forfeiture of the charter of a corporation for acts forbidden by the act. S. P.

National Cotton Oil Co. v. State, 72 S. W. 615 (Tex. Civ. App., 1903); affirmed in 197 U. S. 115; 25 Supm. 379; 49 L. Ed. 609 (1905; the interpretation adopted in the State court being here regarded as controlling). But these decisions seem based on a misunderstanding of the effect of *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 47; 20 Supm. 518, 525; 44 L. Ed. 657 (1900), and inconsistent with *Connolly v. Union Sewer Pipe Co.* The act of 1899 was also held unconstitutional on the same ground in *State v. Waters-Pierce Oil Co.*, 67 S. W. 1057 (Tex. Civ. App., 1902).

The following are instances of agreements or combinations held illegal as in contravention of the act of 1889. Agreement among dealers representing all the bulk or keg beer consumed in El Paso, to jointly control the supply of beer, to cease competition among themselves in respect to it, and to regulate the price thereof in El Paso. *Anheuser-Busch Brewing Assoc. v. Houck*, 27 S. W. 692 (Tex. Civ. App., 1894); affirmed as *Houck v. Anheuser-Busch Brewing Assoc.*, 88 Tex. 184; 30 S. W. 869 (1895). Agreement whereby one person was to have the exclusive agency and right to sell goods manufactured or kept in stock by the other, and was not to sell goods other than those furnished by such other. *White Dental Manuf. Co. v. Hertzberg*, 51 S. W. 355 (Tex. Civ. App., 1899). Conspiracy to combine all the electric light and gas interests in the city of San Antonio, and put them under one management and supervision. *San Antonio Gas Co. v. State*, 22

commerce, or the cost of exchange or transportation, is prohibited and declared unlawful.”⁵⁷ “Any person or association of persons who shall create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation, or understanding with any other person or persons, to regulate or fix the price of any article of merchandise or commodity; or shall enter into, become a member of, or a party to, any pool, trust, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this State, shall be deemed and adjudged guilty of a conspiracy to defraud.”⁵⁸

Tex. Civ. App. 118; 54 S. W. 289 (1899). Agreement of buyer to handle during certain period only goods furnished by the seller. *Mansur v. Tebbetts Implement Co. v. Price*, 22 Tex. Civ. App. 616; 55 S. W. 764 (1900). Combination among all those engaged in supplying ice to the inhabitants of San Antonio. *Crystal Ice & Manuf. Co. v. State*, 23 Tex. Civ. App. 293; 56 S. W. 562 (1900). Combination among dealers to buy the stock and good will of an opposition dealer for one of the prohibited purposes. So held where the purchaser agreed not to engage in the same kind of business. *Comer v. Burton-Lingo Co.*, 24 Tex. Civ. App. 251; 58 S. W. 969 (1900). In *Welch v. Phelps & Bigelow Windmill Co.*, 89 Tex. 653; 36 S. W. 71 (1896), the act was held not to apply to a mere arrangement between principal and agent, though giving the exclusive right to sell in certain territory and fixing prices, but not investing the agent with title to the goods sold. To similar effect, see *Weiboldt v. Standard Fashion Co.*, 80 Ill. App.

67 (1899), under Ill. act (§ 209). But in *Texas Brewing Co. v. Anderson*, 40 S. W. 737 (Tex. Civ. App., 1897), the contract was held to be one of sale and not of agency, notwithstanding the use of the word “agents,” and to be in contravention of such act. To similar effect, *Columbia Carriage Co. v. Hatch*, 19 Tex. Civ. App. 120; 47 S. W. 288 (1898). Compare *Hathaway v. State*, 36 Tex. Crim. 261; 36 S. W. 465 (1896), where a mere agent was held improperly convicted for engaging in a “conspiracy against trade,” in violation of the act. The prohibition of the act was held inapplicable to the case of a purchase of certain property, in *State v. Shippers’ Compress & Warehouse Co.*, 95 Tex. 603; 69 S. W. 58 (1902); of a contract involving sale of patented articles, in *Clark v. Cyclone Woven Wire Fence Co.*, 22 Tex. Civ. App. 41; 54 S. W. 392 (1899; see as to agreement for exclusive trade).

⁵⁷ Comp. Laws (1907), § 1752.

⁵⁸ Id., § 1753. For similar provisions, see under Ala. (§ 204); Ark. (§ 205); Ill. (§ 209); Iowa

§ 233a. **Virginia.**—"The general assembly shall enact laws preventing all trusts, combinations and monopolies inimical to the public welfare."⁵⁹

§ 234. **Washington.**—"Monopolies and trusts shall never be allowed in this State, and no incorporated company, copartnership or association of persons in this State shall directly or indirectly combine to make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity."⁶⁰

(§ 211); Ky. (§ 213); Minn. (§ 218); Miss. (§ 219); Mo. (§ 220); N. D. (§ 226); S. C. (§ 229).

§ 1754 seems substantially the same as Ill. L. 1891, p. 206, § 2 (see § 209). By way of penalty for a violation of the act by "a corporation, a company, a firm or association," a fine of not less than \$100 or more than \$2,000 is prescribed by § 1755 for the first offense; so of not less than \$500 or more than \$5,000 for the second; not less than \$5,000 or more than \$10,000 for the third; of \$15,000 for any subsequent offense.

§ 1756 is substantially the same as Ill. L. 1891, p. 206, § 4, which see, save that the minimum fine is here \$100. "Any contract or agreement in violation of any provision of this title shall be absolutely void." § 1757. By §§ 1758-60 provision is made for a proceeding for the forfeiture of the rights and franchises of a domestic corporation violating any of the preceding provisions. By § 1761 treble damages are allowed for any injury sustained in consequence of

a violation of any of such provisions. See under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Mo. (§ 220); Neb. (§ 222); N. M. (§ 223); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Wis. (§ 235).

"Any combination by individuals, corporations or associations, having for its object or effect the controlling of the price of any products of the soil, or of any article of manufacture or commerce or the cost of exchange or transportation, is prohibited, and hereby declared unlawful and against public policy. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, it may declare a forfeiture of their franchise." Const., art. 12, § 20. For a similar provision, see under N. D. (§ 226). See as to combinations to control information or news for publication, Comp. Laws (1907), §§ 1762x2, et seq.

⁵⁹ Const., art. 12, § 165.

⁶⁰ Const., art. 12, § 22. "The leg-

§ 235. **Wisconsin.**—"Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal."⁶¹ "Any corporation organized under the laws of this State which shall enter into any combination,

islature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise." *Id.* For similar provisions, see under Idaho (§ 208); Md. (§ 216); Mont. (§ 221); N. C. (§ 225); S. D. (§ 230); Tenn. (§ 231); Wyom. (§ 236). In *Wood v. City of Seattle*, 23 Wash. 1, 20; 62 Pac. 135, 141; 52 L. R. A. 369, 393 (1900), such provision was held not to invalidate a municipal ordinance authorizing consolidation of competing street railway lines.

For prohibition of pooling contracts among carriers, see Const., art. 12, § 14; of restrictions upon competition in insurance business, Codes, etc. (1897), § 2841b.

⁶¹ Stat. (1898), § 1747e. See *Hawarden v. Youghiogeny & L. Coal Co.*, 111 Wis. 545; 87 N. W. 472; 55 L. R. A. 828 (1901). "Every person who shall combine or conspire with any other person to monopolize or attempt to monopolize any part of the trade or commerce in this State shall forfeit for each such offense not less than \$50 nor more than \$3,000. Any such person shall also be liable to any person transacting or doing business in this State for all damages he may sustain by reason of the doing of anything forbidden by this section." *Id.* For other provisions as to liability for damages, see under Cal. (§ 206); Kan. (§ 212); Mich. (§ 217); Miss. (§

219); Mo. (§ 220); Neb. (§ 222); N. M. (§ 223); Ohio (§ 227); Okla. (§ 228); S. D. (§ 230); Utah (§ 233). In *Bratt v. Swift*, 99 Wis. 579; 75 N. W. 411 (1898), an action was held maintainable under this provision. The damages recoverable by the plaintiff were declared to be "such sum as would measure his loss of profits and also loss by diminution in the value of his property, by reason of the wrongful acts of the defendants"; but it was held error to admit evidence, as bearing on the question of damages, of the value of the several articles or pieces of property which he sold, and the prices for which he sold them when he sold out his business. By § 1747f provision is made for proceedings to prevent or restrain a violation of the provisions of § 1747e. By § 1747g provision is made for the examination of a party. "The word 'person' wherever used in the three next preceding sections (i. e., §§ 1747e-g) shall be deemed to include besides individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States, any of the territories of this or any other State or of any foreign country; provided that nothing therein shall be construed to affect labor unions or any other association of laborers organized for the purpose of promoting the welfare of its members, nor associations or organizations intended to legitimately pro-

conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this State or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this State, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall upon proof thereof, in any court of competent jurisdiction, have its charter or authority to do business in this State cancelled and annulled.”⁶²

§ 236. **Wyoming.**—“There shall be no consolidation or combination of corporations of any kind whatever to prevent competition, to control or influence productions or prices thereof, or in any manner to interfere with the public good and general welfare.”⁶³

mote the interests of trade, commerce or manufacturing in this State.” § 1747h. For similar exemptions, see under Ill. (§ 209); La. (§ 214); Mich. (§ 217); Mont. (§ 221); Neb. (§ 222); N. C. (§ 225).

⁶² § 1791j as amended by L. 1905, c. 507, § 7; L. 1907, c. 562; see as to affidavit to be filed with annual report. For similar provisions, see under Ga. (§ 207); Kan. (§ 212); Mich. (§ 217); Miss. (§ 219); Neb. (§ 222); N. Y. (§ 224); N. D. (§ 226); Ohio (§ 227); S. D. (§ 230); Tex. (§ 232). As to application of § 1791j to right under patent, see *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 142 Fed. 531 (C. C. Wis., 1906); reversed in 154 Fed. 358; 83 C. C. A. 336 (7th C., 1907). By §§ 1791k-m provision is made

for addressing inquiries to a corporation for the purpose of determining whether it has violated any provision of § 1791j, and for forfeiture of the charter. See § 1791l as amended by L. 1905, c. 507, § 8. For similar provisions, see under Ark. (§ 205); Ill. (§ 209); Mo. (§ 220); Tex. (§ 232). For provisions similar to the above, applicable to foreign corporations, see L. 1905, c. 506.

⁶³ Const., art. 10 (Corporations), § 8. Compare under Ga. (§ 207); N. Y. (§ 224). “Perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed.” Const., art. 1, § 30. For similar provisions, see under Ark. (§ 205); Md. (§ 216); N. C. (§ 225); Okla. (§ 228); S. D. (§ 230); Tenn. (§ 231); Tex. (§ 232); Wash. (§ 234).

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